TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 415

PERCENCE DRUGGAN, APPELLANT,

vs.

PALMER E. ANDERSON, UNITED STATES MARSHAL, ETC., AND WESLEY WESTBROOK, SUPERINTENDENT OF THE COOK COUNTY JAIL OF COOK COUNTY, ILLINOIS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED MAY 1, 1937

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1925

[fols. 1 & 2] CAPTION—Omitted

[fol. 3] **IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

TERRENCE DRUGGAN

vs.

PALMER E. ANDERSON, United States Marshal for the Northern District of Illinois, and Wesley H. Westbrook, Jail Superintendent of the Cook County Jail of Cook County, Illinois.

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 19, 1925

Your petitioner, Terrence Druggan, respectfully represents and shows unto your honors that he is now imprisoned and restrained of his liberty at the County Jail of Cook County, Illinois, at Chicago, under a mittimus issued on a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, whereunder petitioner was sentenced to imprisonment for one year at said jail and fined One Thousand ($1,000) Dollars in a proceeding for contempt of court under section 24 of Title II of the National Prohibition Act; that your petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to review said judgment; that said Court of Appeals affirmed the judgment of the District Court and ordered the issuance of a mandate.

2. Your petitioner further represents that said judgment, sentence and fine, so rendered and imposed by said District Court are illegal and void; that the National Prohibition Act, and in particular Section 24 of Title II thereof, are unconstitutional, excepting from said Act sections 1, 27, 37 and 38 of said Act, which last mentioned sections do not apply or pertain to the issues presented by your petitioner; that the said imprisonment and restraint, as petitioner is informed and verily believes, is illegal and contrary to law.

[fol. 4] 3. Your petitioner further shows that on February 6th, 1924, a bill was filed by the United States against him and certain other persons in a proceeding under section 22 of Title II of the National Prohibition Act to enjoin a nuisance; that a temporary injunction was obtained by the government on February 7th, 1924, without notice to petitioner; that on June 9, 1924, the government filed an information, pursuant to Section 24, Title II of said Prohibition Act, to show cause why petitioner and the persons joined with him should not be punished for contempt of court for certain described alleged violations of the injunctional order above referred to; that thereafter such proceedings were had, without a jury, resulting in said District Court entering judgment against your petitioner and sentencing him to imprisonment in the said

Cook County Jail and to the payment of a fine of One Thousand ($1,000) Dollars.

4. Your petitioner further shows that the injunctional order upon which said contempt proceedings were founded provided

"that pending the final hearing and determination, and until the conclusion of the trial of said bill for injunction against said nuisance, no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of;"

that there was no provision or recital in said injunctional order restraining petitioner from removing any liquor or other property whatsoever from said premises; that the information for contempt set forth three overt acts each specifically relating to an alleged removal of liquor from said premises; that in contempt proceedings under section 24 of Title II of the National Prohibition Act the particular recital of the injunctional order upon which such proceedings are founded is by implication incorporated in said section 24 as fully as though there word for word set forth; that the jurisdiction of the District Court to entertain said contempt proceeding was based upon said section 24; that the jurisdiction of the District Court in the contempt proceeding in the instant case was defined by the terms of the injunctional order and did not reach acts of [fol. 5] removal which were not included in the particular restraints and inhibitions set forth in the injunctional order; that the District Court was without jurisdiction under section 24 of Title II of the National Prohibition Act to proceed under an information for contempt charging acts of removal not specifically restrained by the injunctional order.

5. Your petitioner further shows that a copy of the said mittimus is attached hereto as Exhibit "A"; and that a copy of said bill for injunction and answer thereto, the injunctional order, the information for contempt and answer thereto, the judgment and sentence is likewise attached hereto as Exhibit "B" and incorporated herein by reference.

6. Your petitioner further represents that the National Prohibition Act (excepting only sections 1, 27, 37 and 38 thereof) upon which said act said judgment and conviction are based is unconstitutional for the following reasons:

(a) That section 1 of the Eighteenth Amendment to the Constitution of the United States, provides:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited;"

that the Eighteenth Amendment was proposed to the legislatures of the several States by the Sixty-fifth Congress, on the 19th day of

December 1917, and was, on the 16th day of January 1919, ratified by the legislatures of three-fourths of the whole number of States in the United States and certified by the acting Secretary of State as valid to all intents and purposes as a part of the Constitution of the United States; that the Supreme Court of the United States, in Dillon vs Glos, 256 U. S. 368, declared that the Eighteenth Amendment to the Constitution of the United States went into effect on January 16th, 1920; that under section 1 of the Eighteenth Amendment prohibition did not become effective and operative until one year from the date of its adoption by three-fourths of the whole [fol. 6] number of States, that is to say, it became effective and operative on January 16, 1920; that Congress was without constitutional power to legislate upon the subject of prohibition of intoxicating liquors until the Eighteenth Amendment became operative on January 16, 1920; that the National Prohibition Act was passed over the President's veto on October 28, 1919, nearly three months before the said amendment became operative; that Title II of the National Prohibition Act having been passed prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void; that there is no provision in the Eighteenth Amendment giving to Congress power to legislate with reference to the subject-matter of said Amendment prior to its effective date.

(b) That section 24 of Title II of the National Prohibition Act—the contempt section upon which the judgment complained of is founded—in that it fixes an arbitrary maximum and minimum penatly regardless of the degree of fault of the contemnor is an unconstitutional interference with and invasion of the judicial power; that the discretion of the chancellor in assessing penalties upon contemnors is destroyed by this section; that the District Courts from their creation by the Act of 1831 came into existence clad with plenary power to vindicate their authority and to punish contemnors; that said section 24 invades, supersedes, limits and restricts the inherent plenary power of the District Courts to assess the penalty for contempt of their authority and is, therefore, an unconstitutional interference with and invasion of the judicial power.

(c) That said section 24 in its definition of an arbitrary maximum and minimum punishment without regard to the extent of the contemnor's fault is the creation of a new statutory crime to be tried by a court of equity without a jury and upon affidavits without confrontation of witnesses in violation of the Sixth Amendment [fol. 7] to the Constitution of the United States.

6. Your petitioner further shows that the said District Court made no finding or findings as to which, if any or all, of the acts restrained by the injunctional order constituted the basis of the judgment and sentence; that your petitioner is advised that it is legally presumed that the trial court in imposing sentence apportioned same as to each of the restrained acts even though the punishment

is assessed in the aggregate; that the information for contempt set up three overt acts of removal not embraced or reached by the terms of the injunctional order; that it is impossible to determine from a consideration of said judgment how the District Court apportioned sentence and fine for each of the six restrained acts set forth in the injunctional order and the additional three acts of removal aforesaid set forth in the information for contempt; that for the reasons assigned in this paragraph the judgment, sentence and fine are void.

7. Your petitioner further shows that the injunctional order aforesaid was obtained and granted without notice first given to him; that Equity Rule 73 provides that

"No preliminary injunction shall be granted without notice to the opposite party;"

that under sections 913 and 917 of the Revised Statutes the Equity Rules are given the same force and effect as Acts of Congress; that section 22 of Title II of the National Prohibition Act, under which the bill for injunction aforesaid was instituted provides that

"Such action shall be brought and tried as an action in equity," etc;

that Equity Rule 73 applies to bills brought under section 22 of Title II of the National Prohibition Act; that the non-compliance with Equity Rule 73 went directly to the jurisdiction of the court to grant the temporary injunction aforesaid; that the injunctional order so violating Equity Rule 73 is void and all of the contempt proceedings thereon and the judgment, sentence and fine therein are likewise null and void and of no legal effect whatsoever.

[fol. 8] 8. Your petitioner further shows that he is advised that a judgment for contempt is void unless the facts found to be contemptuous are recited in the judgment order or incorporated therein, by reference to the moving papers, which, in turn, must recite sufficient facts to establish prima facie a contempt; that said judgment order found your petitioner guilty 'as charged in the information,' but your petitioner shows, that, in addition to three acts of removal described in said information, he was charged therein with 'otherwise disposing of said beverage' without further description or recital of any acts or facts which might be embraced by the term 'otherwise disposing of'; that said judgment order in finding your petitioner guilty as charged in said information included a finding that he was guilty of 'otherwise disposing of' without reciting any facts which would constitute 'otherwise disposing of' either in the order itself or by reference to the moving papers; that said judgment as to such finding is void. Your petitioner further shows that the sentence imposed was an integral part of said judgment order; that it was a unit and fixed a joint and non-severable penalty for all of the acts of which your petitioner was found guilty, including the alleged act of 'otherwise disposing of said beverage'; that said judgment as to said last mentioned finding was void and that therefore said judgment order in its entirety was void in that it fixed an

aggregate penalty on the several findings, one of which at least is void.

Your petitioner, therefore, respectfully prays that a Writ of Habeas Corpus may issue in this behalf, directed to Palmer E. Anderson, United States Marshal for the Northern District of Illinois, and to Wesley H. Westbrook, Jail Superintendent of the County Jail of Cook County, Illinois, returnable forthwith, in order that your [fol. 9] Honors may inquire into the cause or pretense of said committment, imprisonment and restraint, as provided by law, to the end that an order might be entered discharging your petitioner out of custody.

And your petitioner will ever pray.

Terrence Druggan, Petitioner. Thomas D. Nash, Michael J. Ahern, Counsel for Petitioner.

Sworn to by Terrence Druggan. Jurat omitted in printing.

Let the Writ of Habeas Corpus issue returnable forthwith.

—— ——, Judge.

[fol. 10] EXHIBIT A TO PETITION

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, set:

The President of the United States of America to the Marshal of the Northern District of Illinois and to the Keeper of the Cook County Jail at Chicago, Illinois:

Whereas, Terrence (Terry) Druggan appeared before the District Court of the United States of America for the Eastern Division of the Northern District of Illinois, on the 26th day of June, 1924, to answer an Information filed therein against him for contempt of court of violating a temporary injunction, as charged in the Information filed June 9th, 1924, and the said Terrence (Terry) Druggan upon hearing in due form of law, having been found guilty as charged in said indictment and having on July 11th, 1924, been sentenced to imprisonment in the Cook County Jail at Chicago, Illinois, for and during a period of one year and to pay a fine of One Thousand Dollars.

Now, therefore, you, the said Marshal, are hereby commanded that you convey the said Terrence (Terry) Druggan to the said Cook County Jail, and you, the said Keeper, of the said Cook County Jail, are hereby commanded that you receive the said Terrence (Terry) Druggan into the said Cook County Jail and him there safely keep until the expiration of said sentence, or until he be discharged therefrom by due process of law.

Witness the Honorable James H. Wilkerson, Judge of the District Court of the United States of America for the said District at

Chicago, aforesaid, this 11th day of July, in the Year of Our Lord Nineteen Hundred 24 and of the independence of the United States the One Hundred and Forty-ninth Year.

John H. R. Jamar, Clerk. (Seal.)

[fol. 11] Endorsements on said Mittimus: No. 3850. In Equity. District Court of the United States, Northern District of Illinois, Eastern Division. United States vs. Standard Beverage Company, Corp., at al. (Terrence "Terry" Druggan). Committment on sentence. Issued 11th day of July, 1924. John H. R. Jamar, Clerk. Executed by delivering the body of the within named defendant to the Jailer of Cook County this November 11th, *day* of A. D. 1924. Frank Farrell, Deputy United States Marshal.

[fol. 12] EXHIBIT B TO PETITION

Common-law Record in Contempt Case

Bill of Complaint

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 3850

UNITED STATES OF AMERICA, Complainant,

vs.

THE STANDARD BEVERAGE CORPORATION, a Corporation, Chicago, Illinois; B. J. Bowman, Richard Curtiss, and Edward Davis, Individually and as President, Secretary, and Treasurer, Respectively, of said Corporation, and Terrence ("Terry") Druggan and Ignatius Kramer.

Bill in Chancery

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery Sitting:

I. The complainant, the United States of America, is a corporation sovereign, and this suit is prosecuted in its name and on its behalf by Edwin A. Olson, United States Attorney for the Northern [fol. 13] District of Illinois, Eastern Division thereof, pursuant to authority thereto granted by Section 22, Title II, National Prohibition Act, and for the purpose of enjoining and abating a certain public and common nuisance as defined in Section 2, Title II, of the said Act of Congress, and now existing upon certain premises situate within the State and Northern District of Illinois, Eastern Division thereof, more particularly described in that paragraph of this bill marked and numbered III."

II. This is a suit of a civil nature arising under the Constitution and laws of the United States and jurisdiction thereof is given to this Honorable Court by Section 22 of Title II of said Act of Congress, and by Section 26 of the Judicial Code of the United States.

III. The complainant is informed and verily believes, and on such information and belief states the facts to be, that the premises and appurtenances which, together with the equipment and liquor therein, constitute said public and common nuisance, are located on South Campbell Avenue, at and near its intersection with West Roosevelt Road, Chicago, Illinois, and are legally described as

Lots Ten (10) and Eleven (11), except the Easterly Twenty-five [fol. 14] (25) feet thereof, and Lots Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17) and Eighteen (18), in Block One (1) in Ogden and Cogghill's Subdivision of Lots Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17) and Eighteen (18), in Ogden's Subdivision of the East Half (½) of the North East Quarter of Section Twenty-four (24), Township Thirty-nine (39), North, Range Thirteen (13) East of the Third Principal Meridian, and

Lots "A" of Standard Brewery Consolidation of parts of Lots Two (2) and Three (3), and part of Pope Court Vacation in Ogden's Subdivision of the East Half (½) of the Northeast Quarter (¼), of Section Twenty-four (24), Township Thirty-nine (39) North, Range Thirteen (13), East of the Third Principal Meridian;

On said premises are buildings, sheds, offices, garages and other structures which, together, form the brewery plant of said corporation. Complainant is informed and verily believes, and on such information and belief states the fact to be, that upon said premises, and in the buildings and structures located thereon, are vats, [fol. 15] tubs, tanks, casks, boilers, pipes, engines, racking machines, machinery, trucks, vehicles, malt mills, malt hoppers, rice hoppers, malt cleaners, barley cleaners, hop mills, cookers, kettles, hop condensers, grain tanks, hop jacks, Zahm dealcoholizers, Swenson evaporators, duplex beer pumps, grain driers, sackers, beer cooler, filters, corbonating pumps, empty barrels, pump tanks, chip tanks, chip washers, pitching machines, empty half-barrels, washing machines, Schangen racker, hops, grain, malt and other products used in the manufacture of beer, and about thirty cars of cases and bottles, and appliances, apparatus, and paraphernalia and products of various kinds, all fit for use and used in the manufacture, keeping, selling, bartering, transportation and other disposition of intoxicating liquor, and also quantities of intoxicating liquor.

This bill is directed against said premises including the building and other structures and their contents, comprising said brewery plant, and the other articles and things in said buildings, as above in this paragraph III alleged, and they and all of them will hereinafter in this bill be collectively referred to as "said premises."

IV. Complainant is informed and verily believes, and on such [fol. 16] information and belief states the fact to be that the defendant the Standard Beverage Corporation, an Illinois corporation, is the owner and proprietor of the business conducted on said premises, as well as the premises themselves, and that B. J. Bowman is president, Richard Curtiss is secretary, and Edward Davis is treasurer of said corporation, and that Terrence ("Terry") Druggan and Ignatius Kramer, together with said corporation officers last named, are in active control of the business and activities of said corporation, and are associated with said corporation and said B. J. Bowman, Richard Curtiss and Edward Davis, and participate, aid, abet and assist in the activities of the said corporation, particularly upon the said premises, and in the maintenance and conduct of said business on said premises as aforesaid. All of said persons in this paragraph named are made parties defendant to this bill, said B. J. Bowman, Richard Curtiss and Edward Davis being made parties defendant both in their official and individual capacities.

V. The complainant is informed and verily believes, and on such information and belief states the fact to be, that for a long time prior to the filing of this bill, and particularly on, to wit, January [fol. 17] 22, 1924, and on said premises was packed in barrels, sold and loaded on trucks and transported from said premises. An affidavit describing some of the activities on said premises is marked "Exhibit A," and is attached to this bill and made a part hereof. The defendants have unlawfully manufactured, sold, kept, possessed, bartered and transported, and otherwise disposed of intoxicating liquor, as defined by the National Prohibition Act, on divers other dates, both before and after the unlawful acts alleged to have occurred on, to wit, January 22, 1924, on said premises.

VI. Complainant is informed and verily believes, and on such information and belief states the fact to be, that unless prevented, and forbidden by the injunction of this Honorable Court, the said unlawful use of said premises will continue and that said defendants will continue in the future to keep, maintain and use said premises, and assist and permit the maintenance and use of the same, as a place where intoxicating liquor is manufactured, sold, kept, bartered, and otherwise disposed of, in violation of Title II of said National Prohibition Act, and as a common and public nuisance as defined in Section 21 of said Title, and as a place from which in- [fol. 18] toxicating liquors are unlawfully withdrawn, removed and transported, and that said defendants, unless commanded by said injunction to prevent, will overlook, neglect and fail to prevent, such maintenance and use of said premises.

VII. Complainant is informed and verily believes, and on such information and belief states the fact to be, that the defendants above named, who are associated together in the business conducted on said premises, threaten and are about to create and keep a common and public nuisance, similar to the nuisance described in this bill, in another place and in other places in the Northern District of

Illinois, Eastern Division, and complainant verily believes that said defendants will carry out their said intentions unless restrained by an injunction of this Court.

VIII. Forasmuch, therefore, as this complainant has no remedy in the premises except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled by right and equity, and pursuant to the provisions of Section 22 of Title II of the National Prohibition Act, it respectfully prays that the above-mentioned defendants, and each of them, be duly sub- [fol. 19] pœnaed and directed full, true and perfect answer to make to this bill of complaint, but not under oath, the answer under oath of each of them being hereby expressly waived, and that said defendants, and each of them, their successors, assigns, trustees, tenants, coadjutors, and all the persons who may be in privity with them, or any of them, in relation to, or who may purchase, or have any interest in, said premises, the business, equipment, fixtures, paraphernalia, and other things in said premises, as well as the agents, servants, subordinates, and employees of each and all of the foregoing, and all other persons, and each and every one of them, be permanently enjoined and restrained from keeping, using, maintaining, or otherwise permitting, and aiding, abetting, or assisting the keeping, using, or maintaining of said premises as a place where intoxicating liquor is manufactured, sold, kept, bartered, or otherwise disposed of in violation of Title II of said National Prohibition Act, and that said defendants and the others above mentioned be commanded not to overlook, neglect or fail to prevent such use or maintenance of said premises.

[fol. 20] The complainant prays that this Honorable Court shall order that said premises shall not be occupied or used for one year subsequent to and immediately after the entry of said order, and further prays that the court shall issue its said process to the Marshal commanding him to see to it that said public and common nuisance is forthwith abated, and to that end to close and seal said premises, and directing him, in order to effect said abatement, to destory the fixtures, machinery, equipment and other things used and kept in maintaining the said nuisance, or to remove to a place of safe keeping the fixtures and other property used and kept in maintaining the said nuisance, and forming a part thereof, as hereinbefore charged, to abide the further order of this court. Said complainant also prays that said Marshal shall be ordered to post appropriate notice on said premises of the entry of the decree of this court.

The complainant prays that this Honorable Court shall order the Marshal to seize all intoxicating liquors on said premises, and further prays that all intoxicating liquor so seized, heretofore seized, or now upon said premises, shall be taken and destroyed by the Marshal, [fol. 21] or upon the application of the United States Attorney shall be delivered to such department or agency of the United States Government as he shall designate, for medicinal, mechanical or scientific uses, or that the same shall be sold at private sale for such

purposes to any person having a permit to purchase liquor, and that the proceeds thereof to be covered into the Treasury of the United States, as provided in Section 27 of Title II of said National Prohibition Act.

Complainant further prays that this Honorable Court shall enter a decree directing that no intoxicating liquor, as defined in Title II of said National Prohibition Act, shall be manufactured, sold, kept, bartered, or otherwise disposed of, in or upon said premises, or any part thereof.

Complainant further prays that an injunction in personam be issued and granted by this Honorable Court against the said defendants, B. J. Bowman, Richard Curtiss, Edward Davis, Terrence ("Terry") Druggan, and Ignatius Kramer, enjoining and restraining them, and each of them, from manufacturing, selling, bartering, or keeping, or soliciting, taking, or accepting orders for the sale, shipment, or delivery of any intoxicating liquor, contrary to the [fol. 22] provisions of the National Prohibition Act, at any place within the Northern District of Illinois, Eastern Division thereof, and that this court shall grant such other and further relief in the premises as your Honors may deem just and equitable.

Complainant further prays that this Honorable Court shall issue a temporary injunction, to be effective until the conclusion of the trial of this case, ordering that no liquor shall be manufactured, sold, kept, bartered, dealcholized or otherwise disposed of, in or upon said premises, or any part thereof, restraining all of the defendants, herein named, and each of them, their successors, assigns, trustees, tenants, coadjutors, and all persons who may be in privity with them, or any of them, in relation to, or who may purchase, or have any interest in, said premises, the business equipment, fixtures, paraphernalia, and other things in and upon said premises, as well as the agents, servants, subordinates and employees of each and all of the foregoing, and all other persons, and each and every one of them, from conducting or permitting the continuance of said common nuisance; from removing or in any way interfering with the [fol. 23] liquor or fixtures or other things used in connection with the violation of the National Prohibition Act on said premises, constituting said nuisance; and from keeping, using, maintaning, or otherwise permitting, aiding, abetting, or assisting the keeping, using or maintaining of said premises, as a place where intoxicating liquor is manufactured, sold, kept, bartered, or otherwise disposed of, in violation of Title II of the National Prohibition Act; ordering them not to overlook, neglect, or fail to prevent, such use or maintenance of said premises.

United States of America, Complainant, by Edwin A. Olson, United States Attorney for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

STATE OF ILLINOIS,
County of Cook, ss:

Edwin A. Olson, being first duly sworn, on oath, deposes and says that he is United States Attorney for the Northern District of Illinois, Eastern Division, and is in charge of this action.
[fol. 24] Deponent has read the foregoing bill of complaint, knows the contents thereof, and says that the same is true of his own knowledge and belief, except as to those matters herein stated to be alleged upon information and belief, and, as to those matters he believes it to be true.

Edwin A. Olson.

Subscribed and sworn to before me this 6th day of February, A. D. 1924. William A. Small, Notary Public. (Seal.)

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

STATE OF ILLINOIS,
County of Cook, ss:

Brice F. Armstrong, being first duly sworn, on oath deposes and says:

I am an employee of the Internal Revenue Department of the United States, attached to the Prohibition Office, Chicago, Illinois, and my position is generally known as that of federal prohibition agent.

On, to wit, December 19, 1923, in company with Agent A. L. Lewis, I went to the premises of the Standard Beverage Corporation, [fol. 25] one of the defendants named in this bill of complaint, which said Standard Beverage Company has been from, to wit, September 7, 1923, conducting a brewery on the premises described in the bill of complaint, without a permit from the Commissioner of Internal Revenue authorizing it and permitting it to manufacture beer containing one-half of one per cent, or more, of alcohol by volume, and dealcoholizing the same. Said Standard Beverage Corporation made application for such a permit prior to December 19, 1923, and for the purpose of making an inspection of said premises in connection with said application, I proceeded to the said premises with Agent Lewis on, to wit, December 19, 1923. We arrived at said premises and were refused admission and were told to return later the same day, which we did. Upon our arrival there we were met by B. J. Bowman, President of the corporation, Richard Curtiss, Secretary of the Corporation, and Ignatius Kramer, Brewmaster. Said Curtiss and Kramer conducted Agent Lewis and me through the brewery premises, pointing out to us the method of operation, the amount of

raw materials on hand for the manufacture of beer, and casks of beer containing more than one-half of one per cent of alcohol by volume. [fol. 26] There were on the premises twenty-four casks of two hundred fifty barrels capacity each eight of which were filled with beer. We took a sample of beer from Cask No. 10 and one from cask No. 11, which samples were put into containers and poisoned to arrest further fermentation, and on the same date, to wit, December 19, 1923, delivered said samples to John W. Fenner, Chemist in Charge, Bureau of Internal Revenue, Chicago, for analysis as to the alcoholic content thereof.

On, to wit, January 22, 1924, in company with Agents Lewis, Loeffler, Kominokis, McNally, Butterfield, and Deputy United States Marshals Emery and Capps, I proceeded to the premises of the Standard Beverage Corporation to execute a search warrant duly issued from the District Court of the United States for the Northern District of Illinois. We executed the search warrant and took twenty-two samples of beer which had been manufactured and possessed on the premises of the said Standard Beverage Corporation. We poisoned, labeled and marked for identification said samples and delivered them to the United States Chemical Laboratory for analysis.

Affiant states that on December 19, 1923, when he visited the [fol. 27] premises of said brewery located as described in bill of complaint, he tested each of the samples taken by him, and that when he visited the premises on January 22, 1924, he tasted a number of samples taken from different containers on said premises. Affiant has tasted and drunk liquids containing more than one-half of one per cent of alcohol by volume many times within the past ten years, and is familiar with the taste of such liquids containing said alcoholic content, particularly beer, and from such experience is able to say and does say that the samples which he tasted were beer fit for beverage purposes, and contained more than one-half of one per cent of alcohol by volume.

Terrence ("Terry") Druggan is financially interested and in control of the operations of said brewery. Edward Davis is treasurer of said corporation and participates in its activities.

Brice F. Armstrong.

Subscribed and sworn to before me this 6th day of February, A. D. 1924. William A. Small, Notary Public. (Seal.)

(Endorsed:) Filed Feb. 6, 1924. John H. R. Jamar, Clerk.

[fol. 28] Endorsed: No 3850. In the District Court of the United States, for the Northern District of Illinois, Eastern Division, United States of America vs. the Standard Beverage Corporation, a corporation; B. J. Bowman, Richard Curtiss, Edward Davis, Individually and as President, Secretary, and Treasurer of said corporation; Terrence ("Terry") Druggan and Ignatius Kramer. Bill in Chancery. Filed Feb. 6, 1924, at — o'clock, —. M., by John H. R. Jamar, Clerk. Edwin A. Olson, United States Attorney.

And on, to-wit, the 7th day of February, 1924, came John W. Fonner, and filed in the office of the clerk of said court his certain Affidavit in support of Bill of Complaint in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

STATE OF ILLINOIS,
County of Cook:

In Equity. No.—

UNITED STATES OF AMERICA

vs.

THE STANDARD BEVERAGE CORPORATION, a Corporation, et al.

[fol. 29] Affidavit in Support of Bill of Complaint

John W. Fonner, being first duly sworn, on oath deposes and says:

I am United States Internal Revenue Chemist in Charge, stationed at Chicago, Illinois, in the Transportation Building.

On, to wit, December 19, 1923, I received from Brice F. Armstrong, Federal Prohibition Agent, two samples of beer. The bottles containing the samples bore labels indicating that the beer came from containers on the brewery premises of the Standard Beverage Corporation on the said 19th day of December, 1923.

I analyzed said samples on, to wit, December 20, 1923, for the purpose of ascertaining the alcoholic content thereof, and found that one of the samples, to which was assigned laboratory number 32983, contained 3.28 per centum of alcohol by volume, and that the other sample, to which was assigned laboratory number 32984, contained 3.22 per centum of alcohol by volume.

On, to wit, January 23, 1924, I received from Brice F. Armstrong and A. L. Lewis, Federal Prohibition Agents, twenty-two samples of beer. The bottle containing the samples bore labels indicating that [fol. 30] the beer came from containers of beer found on the premises of the Standard Beverage Corporation on, to wit, January 22, 1924. The Prohibition Agents whose names appeared on said labels as those who had taken the samples and marked and sealed same, were Brice F. Armstrong, James Kominakis and L. B. McNally. I analyzed said samples and found that eleven of them contained more than four per cent of alcohol by volume, and were intoxicating; that four of the samples contained between three and four per cent of alcohol by volume, and one of the samples contained four per cent of alcohol by volume.

John W. Fonner.

Subscribed and sworn to before me this 7 day of February, A. D. 1924. August F. Kruse, Notary Public. (Seal.)

(Copy.)

(Endorsed:) Filed February 7, 1924. John H. R. Jamar, Clerk.

(Endorsed:) No. 3850. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. The Standard Beverage Corporation, corporation, et al. Affidavit in Support of Bill of Complaint. Filed Feb. 7, 1924. John H. R. Jamar, Clerk. Edwin A. Olson, United States [fol. 31] Attorney.

And afterwards, on, to wit, the 7th day of February, 1924, this matter coming on to be heard, the following order was entered by the Court:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Thursday, February 7, A. D. 1924.

Present: Honorable James H. Wilkerson, District Judge.

In Equity. No.—

UNITED STATES OF AMERICA, Complainant,

vs.

THE STANDARD BEVERAGE CORPORATION, a Corporation, Chicago, Illinois; B. J. Bowman, Richard Curtis, and Edward Davis, Individually and as President, Secretary, and Treasurer, Respectively, of said Corporation; Torrence ("Terry") Druggan and Ignatius Kramer, Defendants.

Order for Temporary Injunction

And now, on this 7th day of February, A. D. 1924, this cause coming on to be heard upon the bill of complaint heretofore filed in this court, and upon the affidavits of Edwin A. Olson, Brice F. Armstrong, and John W. Fonner, duly filed in open court, and it [fol. 32] appearing to the satisfaction of the Court by inspection of the bill and said affidavits and otherwise, that a nuisance under the National Prohibition Act exists as described in said bill on the premises hereinafter described, it is

Ordered, that pending the final hearing and determination, and until the conclusion of the trial of said bill of injunction against said nuisance, no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of, in or upon the premises, or any part thereof, located in the City of Chicago at West Roosevelt Road and South Campbell avenue, County of Cook, State of Illinois, described as follows:

Lots Ten (10) and Eleven (11), except the Easterly Twenty-five (25) feet thereof, and Lots Twelve (12), Thirteen (13), Fourteen

(14), Fifteen (15), Sixteen, Seventeen (17) and Eighteen (18), in Block One (1) in Ogden and Cogghill's Subdivision of Lots Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17), and Eighteen (18), in Ogden's Subdivision of the East Half (½) of the North East Quarter, of Section Twenty-four (24), Township Thirty-nine (39), North, Range Thirteen (13), East of the [fol. 33] Third Principal Meridian, and

Lots "A" of Standard Brewery Consolidation of parts of Lots Two (2) and Three (3), and part of Pope Court Vacation in Ogden's Subdivision of the East Half (½) of the North East Quarter (¼), of Section Twenty-four (24), Township Thirty-nine (39) North, Range Thirteen (13), East of the Third Principal Meridian,

including the buildings, brewery equipment, garages, sheds, and other structures on said premises; and that all of the defendants, the Standard Beverage Corporation, a corporation, B. J. Bowman, Richard Curtiss, and Edward Davis, individually and as President, Secretary, and Treasurer of said corporation; Terrence ("Terry") Druggan and Ignatius Kramer, and each of them, their successors, assigns, trustees, tenants, coadjutors, and all other persons who may be in privity with them, or any of them, in relation to, or who may purchase, or have any interest in, said premises, the business, equipment, fixtures, paraphernalia, and other things on said premises, as well as the agents, servants, subordinates, and employees of each and all of the foregoing, and all other persons, and each and every one of them, be restrained and enjoined from keeping, using, main- [fol. 34] taining, dealcoholizing, or otherwise permitting and aiding, abetting, or assisting the keeping, using, or maintaining of said premises as a place where intoxicating liquor is manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of in violation of Title II of said National Prohibition Act, and that said defendants, and the others above mentioned, be commanded not to overlook, neglect or fail to prevent such use or maintenance of said premises.

Feby. 7, 1924.

Enter.

James H. Wilkerson, United States Judge.

Dated at Chicago, Illinois, this 7th day of February, A. D. 1924.

And on, to-wit, the 26th day of March, 1924, there was filed in the office of the Clerk of said Court the following Writ of Temporary Injunction with Return of Marshal/ thereon endorsed:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[fol. 35] In Equity. No. 2850

UNITED STATES OF AMERICA, Complainant,

vs.

THE STANDARD BEVERAGE CORPORATION, a Corporation, Chicago, Illinois; B. J. Bowman, Richard Curtiss, and Edward Davis, Individually and as President, Secretary, and Treasurer, Respectively, of said Corporation, and Terrence ("Terry") Druggan and Ignatius Kramer, Defendants.

Writ of Temporary Injunction

To the Standard Beverage Corporation, a corporation, Chicago, Illinois; B. J. Bowman, Richard Curtiss, and Edward Davis, Individually and as President, Secretary, and Treasurer, respectively, of said corporation, and Terrence ("Terry") Druggan and Ignatius Kramer, as well the successors, assigns, trustees, tenants, coadjutors, agents, servants, subordinates, and employees of each and all of the foregoing and all others hereinafter mentioned, Greeting:

Know Ye, that in the above entitled cause, a motion for the issuance of a temporary injunction has been duly filed by complainant, and said motion upon due consideration has been by the court granted and such injunction issued. A copy of the order is hereto [fol. 36] attached and made a part hereof.

Witness the hand and the seal of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, this 7th day of February, A. D. 1924.

John H. R. Jamar, Clerk. (Seal.)

And on, to-wit, the 31st day of March, 1924, came the Defendants, by their attorney, and filed in the office of the clerk of said court their certain Answer in words and figures as follows, to-wit:

Answer

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 3850

UNITED STATES OF AMERICA, Complainant,

vs.

THE STANDARD BEVERAGE CORPORATION, a Corporation, Chicago, Illinois; B. J. Bowman, Richard Curtiss, ond Edward Davies, Individually and as President, Secretary, and Vice-President, Respectively, of said Corporation, and Terrence Druggan and Ignatius Kramer.

[fol. 37] The joint and several answer of Standard Beverage Corporation, B. J. Bowman, Richard Curtiss, and Edward Davis, individually and as president, secretary, and vice-president, respectively, of said corporation; Terrence Druggan and Ignatius Kramer, defendants, to the bill of complaint of United States of America, complainant.

These defendants, reserving unto themselves all right of exception to the said bill of complaint, for answer thereunto, say:

(1) These defendants admit that the United States of America is a corporation sovereign and that said suit is prosecuted in its name and on its behalf by Edwin A. Olson, United States Attorney for the Northern District of Illinois, Eastern Division thereof, pursuant to authority thereto granted by Section 22, Title II, National Prohibition Act; but deny that a public and common nuisance as defined in Section 2, Title II of the said Act of Congress is now existing upon the premises situate within the State and Northern District of Illinois, Eastern division thereof, described in paragraph numbered "III" in said bill of complaint.

(2) These defendants, further answering, admit that said suit is of a civil nature arising under the Constitution and laws of the [fol. 38] United States, and that jurisdiction thereof is given to this Honorable Court by Section 22 of Title II of said act of Congress and by Section 26 of the judicial Code of the United States.

(3) These defendants, further answering, deny that the premises described in Paragraph III of said bill of complaint, together with the equipment or contents thereof constitute a public and common nuisance, as defined aforesaid.

These defendants, further answering, admit that in the building and structures located on said premises there are vats, tubs, tanks, casks, boilers, pipes, engines, racking machines, machinery, trucks, vehicles, malt mills, malt hoppers, rice hoppers, malt cleaners, barley cleaners, hop mills, cookers, kettles, hop condensers, grain tanks, hop

jacks, Zahn dealcoholizers, Swenson evaporators, duplex beer pumps, grain drier, sackers, beer cooler, filter, carbonating pumps, empty half-barrels, washing machine, Schangen, racker, hops, grain, malt, and other products used in the manufacture of beer as well as in the manufacture of non-intoxicating cereal or non-cereal beverages; that there are a number of cars of cases and bottles, and appliances, [fol. 39] apparatus and paraphernalia and products of various kinds, fit for use in the manufacture, keeping, selling, bartering, transportation and other disposition of intoxicating liquor as well as for the manufacture, keeping, selling, or bartering, transporting and other disposition of non-intoxicating cereal or non-cereal beverages; but these defendants deny that said appliances, machinery, paraphernalia and supplies above enumerated, or any of them have been used by these defendants, or any of them, in the selling, bartering, transportation or other disposition of intoxicating liquor, or have been used in the manufacture or keeping of intoxicating liquor as a finished product or for beverage purposes, and deny that there is or was at the time of the filing of said bill of complaint, on said premises, intoxicating liquor as a finished product or for beverage purposes.

(4) These defendants, further answering, admit that the defendant, Standard Beverage Corporation, an Illinois corporation, is the owner and proprietor of the business conducted on said premises, as well as the premises themselves; that B. J. Bowman is President, Richard Curtiss is Secretary and Treasurer and Edward Davies is [fol. 40] Vice President of said corporation; that said officers are in active control of the business and activities of said corporation; that Terrence Druggan is General Sales Manager and Ignatius Kramer is employed by said corporation.

(5) These defendants further answering, deny that on January 22, 1924 or from the time the Standard Beverage Corporation took possession of said premises until the time of the filing of the bill, said premises was or had been used as a place where intoxicating liquor, as defined by Section 1 of Title II of the National Prohibition Act, in violation of Title II of said Act, was bartered, sold, transported or otherwise disposed of or a place from which intoxicating liquor was unlawfully withdrawn, removed or transported, or as a place where intoxicating liquor as a finished product or for beverage purposes was manufactured and kept; and these defendants further deny that said premises and all property kept and used in maintaining the same, or any of it, are a public and common nuisance as defined and declared by Section 21 of Title II of said National Prohibition Act.

These defendants, further answering, deny that beer as a finished [fol. 41] product or for beverage purposes, containing more than one-half of one per cent of alcohol by volume was unlawfully manufactured or kept or possessed on said premises on January 22, 1924, or at any time from the time the Standard Beverage Corporation took possession of said premises until the time of the filing of said bill of complaint; and deny that on said premises on said day or during

said period beer or other intoxicating liquor was packed in barrels, sold or loaded on trucks or was transported from said premises.

These defendants, further answering, deny that on said premises they have manufactured, kept or possessed intoxicating liquor as a finished product or for beverage purposes, on divers other or any dates before or after the acts alleged by said bill of complaint to have occurred on January 22, 1924 and hereinabove denied. These defendants deny that on divers other dates, as aforesaid, they have sold, transported or otherwise disposed of intoxicating liquor as defined by the National Prohibition Act.

But, these defendants, further answering, say that said premises, buildings, machinery, etc. were purchased by the defendant, Standard [fol. 42] Beverage Corporation, from the Standard Products Company, an Illinois Corporation, on or about September 1st, 1923; that said Standard Products Company had a permit under the National Prohibition Act to manufacture cereal beverage by manufacture and dealcoholization of beer and that at the time of said purchase said permit was in full force and effect; that upon said purchase the Standard Beverage Corporation applied for a similar permit and said application was still pending at the time of the filing of said bill of complaint; that said Standard Beverage Corporation purchased from the Standard Products Company its good will, accounts, uncompleted contracts and all the incidents of a going business; that said Standard Beverage Corporation by its officers informed the local Prohibition Director's office of the situation and was authorized by it to proceed with the brewing and dealcoholization under the Standard Products Company's permit pending action on the permit applied for by said Standard Beverage Corporation.

These defendants, further answering, admit that during the period of the possession of said premises by Standard Beverage Corporation materials containing more than one-half of one per cent by volume [fol. 43] of alcohol for the manufacture of non-intoxicating cereal beverage were from time to time manufactured and possessed; but say that said materials were always dealcoholized in completing the product; that no beverage, material or liquid of any kind containing more than one-half of one per cent by volume of alcohol left the premises after the Standard Beverage Corporation purchased and took possession of said premises.

These defendants, further answering, say that by reason of the facts hereinabove stated, and particularly the authority and consent of one of complainant's officers and agents said bill of complaint and the prayers for relief therein contained are inequitable and unconscionable.

(6) These defendants, further answering, deny that they, or any of them, will in the future, unless prevented and forbidden by the injunction of this Honorable Court, keep, maintain, or use said premises or assist or permit the maintenance and use of the same as a place where intoxicating liquor is manufactured, sold, kept, bartered or otherwise disposed of, in violation of Title II of said National Prohibition Act, or as a common and public nuisance as defined in [fol. 44] Section 21 of said Title or as a place from which intoxicat-

ing liquors are unlawfully withdrawn, removed or transported, or that these defendants or any of them will overlook, neglect or fail to prevent such maintenance or use of said premises.

(7) These defendants, further answering, deny that these defendants or any of them threaten or are about to create a common and public nuisance anywhere in the Northern District of Illinois.

And these defendants, further answering, deny that the complainant is entitled to the relief, or any part thereof, in said bill of complaint demanded, and pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Standard Beverage Corporation, by B. J. Bowman, Its President. B. J. Bowman, Individually and as President of said Corporation. Richard Curtis, Individually and as Secretary of said Corporation. Edward N. Davies, Individually and as Vice-President of said corporation.
[fol. 45] Terrence Druggan, Ignatius Kremer. Lyman W. Sherwood, Solicitor for the Defendants.

(Endorsed:) Filed March 31, 1924. John H. R. Jamar, Clerk.

And on, to-wit, the 9th day of June, 1924, came Plaintiff, by United States Attorney, and filed in the office of the Clerk of said Court its certain Information for Contempt in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In the District Court Thereof, June Term, A. D. 1924, ss.

No. 3850

UNITED STATES OF AMERICA

vs.

TERRENCE DRUGGAN, Alias TERRY DRUGGAN; B. J. BOWMAN, Richard Curtiss, Edward Davis, Alias Edward N. Davies; Ignatius Kramer, Alias Ignatius Kremer; Frank Lake, Francis A. Morrison, and Standard Beverage Corporation, a Corporation.

Information for Contempt

Now comes the United States of America by Edwin A. Olson, United States Attorney for the Northern District of Illinois, and [fol. 46] gives the court here to understand and be informed that, on or about the 7th day of February, A. D. 1924, in a cause then pending in the United States District Court at Chicago, for the Northern District of Illinois, Eastern Division, entitled the United States of America vs. Standard Beverage Corporation, a Corporation, et al., bearing District Court No. 3850, in Equity, a decree was en-

tered by the Honorable James H. Wilkerson, one of the Judges of said court, which said decree provided, among other things, that pending the final hearing and determination, and until the conclusion of the trial of said Bill for Injunction against the nuisance described therein, no liquor should be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of, in, or upon the premises described in said bill, or any part thereof, and that all of the defendants, Standard Beverage Corporation, a corporation, B. J. Bowman, Richard Curtiss, and Edward Davies, individually and as President, Secretary and Treasurer respectively of said Corporation, Terrence (Terry) Druggan, and Ignatius Kramer, and each of them, their successors, assigns, trustees, tenants, coadjutors, and all persons who [fol. 47] might be in privity with them, or any of them, in relation to, or who might purchase or have any interest in said premises, the business, equipment, fixtures, paraphernalia, and other things on said premises, as well as the agents, servants, subordinates, and employees, and all of them, and all other persons, and each and every of them, be restrained and enjoined from keeping, using, maintaining, dealcoholizing, or otherwise permitting and aiding, abetting or assisting the keeping, using, or maintaining of said premises as a place where intoxicating liquor was manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of in violation of Title II of the National Prohibition Act, and that all of them were commanded not to overlook, neglect, or fail to prevent such use or maintenance of said premises.

That on or about the 7th day of February, A. D. 1924, a writ of temporary injunction granted pursuant to the provisions of Title II of the National Prohibition Act, issued out of the District Court of the United States for the Northern District of Illinois, Eastern Division thereof, directed to the defendants named in the order for temporary injunction; which said writ was duly served on the defendants, Standard Beverage Corporation, a Corporation, B. J. Row- [fol. 48] man, individually, and as President of said Corporation, and Richard Curtiss, individually and as Secretary of said Corporation, on or about the 11th day of February, A. D. 1924, and upon the defendant, Terrence Druggan, on or about the 24th day of March, A. D. 1924, by the United States Marshal for the Northern District of Illinois, Eastern Division thereof.

That on or about the 11th day of February, A. D. 1924, public notice of the issuance of the writ of temporary injunction was given by the United States Marshal for the Northern District of Illinois, Eastern Division thereof, by the posting of printed notices in and about the premises described in the order for temporary injunction.

That on or about the 31st day of March, A. D. 1924, the defendants named in said Bill of Complaint, said Decree, and said Writ of Temporary Injunction, filed their joint and several answer to said Bill of Complaint in said District Court of the United States.

That the aforesaid Terrence Druggan, alias Terry Druggan, B. J. Bowman, Richard Curtiss, Edward Davis, alias Edward N. Davies, Ignatius Kramer, alias Ignatius Kremer, Frank Lake, Francis A. [fol. 49] Morrison, and Standard Beverage Corporation, a Corpo-

ration, well knowing that said order for temporary injunction had been granted, and was then and there in full force and effect, did then and there violate the same in the manner following, to wit:

1. The said Terrence Druggan, alias Terry Druggan, B. J. Bowman, Richard Curtiss, Edward Davis, alias Edward N. Davies, Ignatius Kramer, alias Ignatius Kremer, Frank Lake, Francis A. Morrison, and Standard Beverage Corporation, a Corporation, on or about the 31st day of May, A. D. 1924, removed from the premises described in said Order for Temporary Injunction, a large number of barrels, to wit, 200 barrels, each barrel then and there containing a large quantity, to wit, 31 gallons of a cereal beverage commonly known as beer, fit for use for beverage purposes, which said cereal beverage did then and there contain more than one-half of one per centum of alcohol by volume, and the said defendants did then and there cause the said barrels hereinbefore described, to be placed in a certain railroad car and to be transported therein from the said premises to a place commonly known and described as the California Avenue Team Track of the Baltimore and Ohio Chicago Terminal Railroad Company, located at or near the intersection of California [fol. 50] avenue and Taylor street, two public thoroughfares, in the County of Cook and State of Illinois, in the division and district aforesaid; and the said defendants did then and there cause said beverage to be so removed and transported, and did then and there aid, abet, and assist in the removal and transportation thereof, and did then and there permit said beverage to be so removed and transported as aforesaid, and did then and there manufacture, sell, keep, barter, dealcoholize, and otherwise dispose of said beverage, and did then and there neglect and fail to prevent the removal and transportation of said beverage out of and from the said premises.

2. That said Terrence Druggan, alias Terry Druggan, B. J. Bowman, Richard Curtiss, Edward Davis, alias Edward N. Davies, Ignatius Kramer also Ignatius Kremer, —— Lake, Francis A. Morrison, and Standard Beverage Corporation, a Corporation, on or about the 2nd day of June, A. D. 1924, removed from the premises described in the said order for temporary injunction, a large number of barrels, to wit, 400 barrels, each barrel then and there containing a large quantity, to wit, 31 gallons, of a cereal beverage commonly known as beer, fit for use for beverage purposes, which said cereal beverage did [fol. 51] then and there contain more than one-half of one per centum of alcohol by volume, and the said defendants did then and there cause the said barrels hereinbefore described, to be placed in two certain railroad cars, and to be transported therein from the said premises to a place commonly known and described as the California Avenue Team Track of the Baltimore and Ohio Chicago Terminal Railroad Company, located at or near the intersection of California avenue and Taylor street, two public thoroughfares, in the County of Cook and State of Illinois, in the division and district aforesaid; and the said defendants did then and there cause said beverage to be so removed and transported, and did then and there aid, abet, and assist in the removal and transportation thereof, and did then and

there permit said beverage to be so removed and transported as aforesaid, and did then and there manufacture, sell, keep, barter, dealcoholize, and otherwise dispose of said beverage, and did then and there neglect and fail to prevent the removal and transportation of said beverage out of and from the said premises.

3. That said Terrence Druggan, alias Terry Druggan, B. J. Bow-[fol. 52] man, Richard Curtiss, Edward Davis, alias Edward N. Davies, Ignatius Kramer, alias Ignatius Kremer, Frank Lake, Francis A. Morrison, and Standard Beverage Corporation, a Corporation, on or about the 3d day of June, A. D. 1924, removed from the premises described in the said order for Temporary injunction, a large number of barrels, to wit, 200 barrels, each barrel then and there containing a large quantity, to wit, 31 gallons, of a cereal beverage commonly known as beer, fit for use for beverage purposes, which said cereal beverage did then and there contain more than one-half of one per-centum of alcohol by volume, and the said defendants did then and there cause the said barrels hereinbefore described, to be placed in a certain railroad car, and to be transported therein from the said premises to a place commonly known and described as the California Avenue Team Track of the Baltimore and Ohio Chicago Terminal Railroad Company, located at or near the intersection of California Avenue and Taylor street, two public thoroughfares, in the County of Cook and State of Illinois, in the division and district aforesaid; and the said defendants did then and there cause said beverage to be so removed and transported, and did then and there aid, abet, and assist in the removal and transportation thereof, and did then and [fol. 53] there permit said beverage to be so removed and transported as aforesaid, and did then and there manufacture, sell, keep, barter, dealcoholize, and otherwise dispose of said beverage, and did then an there neglect and fail to prevent the removal and transportation of said beverage out of and from the said premises.

4. That officers of the United States engaged in the enforcement of the provisions of the National Prohibition Act obtained samples of the contents of nine of said barrels, which said samples were analyzed and found to be a cereal beverage fit for use for beverage purposes, containing more than one-half of one per centum of alcohol by volume.

Wherefore, the said United States Attorney for the said United States moves this Honorable Court to forthwith cause warrants to issue under which the said defendants, Terrence Druggan, alias Terry Druggan, B. J. Bowman, Richard Curtiss, Edward Davis, alias Edward N. Davies, Ignatius Kramer, alias Ignatius Kremer, Frank Lake, Francis A. Morrison, and Standard Beverage Corporation, a Corporation, shall be arrested, and to punish them for contempt under the provisions of Section 24 Title II, National Pro-[fol. 54] hibition Act.

Edwin A. Olson, United States Attorney.

STATE OF ILLINOIS,
County of Cook, ss:

Alfred Johnson, Oscar Sandberg, Paul W. Simons, J. F. Beaupeurt, and Archie Benson, being first duly sworn, on oath say that they are familiar with the contents of the foregoing document by the United States Attorney subscribed, and that the matters and things contained therein are true.

Alfred Johnson, Oscar C. Sandberg, Paul W. Simons, J. F. Beaupeurt, Archie M. Benson.

Subscribed and sworn to before me this 9th day of June, A. D. 1924. Edward J. Gerrity, Notary Public. (Seal.)

(Endorsed:) Filed Jun. 9, 1924. John H. R. Jamar, Clerk.

[fol. 55] And on, to-wit, the 26th day of June, 1924, came defendants, by their attorneys, and filed in the office of the clerk of said court their certain Answer to Information for Contempt in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In the District Court Thereof, June Term, A. D. 1924

UNITED STATES OF AMERICA

vs.

TERRENCE DRUGGAN, Alias TERRY DRUGGAN; B. J. BOWMAN, Richard Curtiss, Edward Davis, Alias Edward N. Davies; Ignatius Kramer, Alias Ignatius Kremer; Frank Lake, Francis A. Morrison, and Standard Beverage Corporation, a Corporation.

The Answer of Terrence Druggan, B. J. Bowman, Ignatius Kramer, Frank Lake, and Francis A. Morrison to the Petition Filed by Complainant June 9th, 1924.

These defendants, for answer to said petition, say that they did not on either the 31st day of May, the 2nd day of June, or the 3rd day of June, A. D. 1924, remove any cereal beverage, commonly known [fol. 56] as beer, containing more than one-half of one per centum of alcohol by volume from the premises mentioned in said complaint, nor caused the same to be transported, as alleged in said petition, to the California Avenue Team Track of the Baltimore and Ohio Chicago Terminal Railroad Co., nor cause any such beverage to be removed, nor aid, abet or assist in the removal or transportation, thereof, nor permit the same, nor manufacture, sell, keep, barter, dealcoholize or otherwise dispose of any such beverage nor neglect or fail to prevent the removal or transportation of any such beverage out of and from said premises.

And having answered, these defendants pray to be hence dismissed. Terrence Druggan et al., by Counsel, Defendants. Clarence Darrow, Floyd Lanham, Attorneys for Defendants.

(Endorsed:) Filed Jun. 26, 1924. John H. R. Jamar, Clerk.

Sentence and Judgment

And afterwards, to-wit, on the 11th day of July, 1924, being one of [fol. 57] the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Friday, July 11, A. D. 1924.

Present: Honorable James H. Wilkerson, District Judge.

No. 3850

UNITED STATES OF AMERICA

vs.

STANDARD BEVERAGE COMPANY, a Corporation; TERRANCE DRUGGAN, FRANK LAKE, B. J. BOWMAN, and IGNATIUS KRAMER

This cause having heretofore come on to be heard upon the information filed herein on the 9th day of June, 1924, against Terrance Druggan and Frank Lake for contempt of court for violating the temporary injunction issued herein, and the Court having considered the evidence adduced and being now fully advised in the premises finds said defendants, Terrance Druggan and Frank Lake, guilty of contempt of Court of violating the temporary injunction as [fol. 58] charged in said information.

It is therefore considered by the Court and is the sentence and judgment of the Court upon the finding aforesaid that the said defendants, Terrance Druggan and Frank Lake, and each of them be confined and imprisoned in the County Jail of Cook County, Illinios, for and during a period of one year, and that said defendants forfeit and pay to the United States of America a fine in the sum of One Thousand Dollars ($1,000.00), each, besides the costs in this behalf expended for which let execution issue.

Thereupon said defendants move the Court in arrest of judgment, which motion is heard and overruled, to which ruling said defendants except.

It is further ordered by the Court that Standard Beverage Company, B. J. Bowman and Ignatius Kramer be and they are hereby discharged.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER TO PETITION FOR HABEAS CORPUS—Filed April 4, 1925

And the said Palmer E. Anderson, United States Marshal, and Wesley H. Westbrook, Jail Superintendent of the Cook County Jail of Cook County, Illinois, by Edwin A. Olson, United States Attorney, their attorney, come into court and say that the said petition for habeas corpus and the affidavit in support thereto and the matters and things therein set forth are, as therein alleged and set forth, insufficient in law to compel them, the said respondents, to answer thereto, and this they are ready to verify.

Wherefor, these respondents pray judgment and that said petition for habeas corpus may be dismissed and the application for writ of habeas corpus therein be denied.

Edwin A. Olson, United States Attorney.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING PETITION—April 22, 1925

This day again come the parties to this suit by their attorneys, respectively, and thereupon this cause coming on further to be heard on Petitioner's petition for Writ of Habeas Corpus and the Respondents' Demurrer thereto, and the Court now hereafter hearing arguments of counsel and due deliberation by the Court, said Demurrer is sustained.

It is therefore Ordered that Petitioner's petition herein be and the same is hereby dismissed.

Whereupon the petitioner prays an appeal from the above judgment of this court to the Supreme Court of the United States which is allowed upon the petitioner filing herein his Appeal Bond in the penal sum of Five Hundred Dollars ($500.00) to be approved by the Court within ten days from this date,

Whereupon the Petitioner herein enters his motion to be released from custody upon filing a good and sufficient bond, which motion is overruled and denied.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed April 22, 1925

And now comes your petitioner and respectfully represents that on the 22nd day of April, 1925, a judgment was entered by this court dismissing his petition for habeas corpus.

And your petitioner respectfully shows that in said record, proceedings and judgment in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed from said judgment to the Supreme Court of the United States and that said appeal may be made a supersedeas upon the filing of a bond in the sum of Five Hundred ($500.00) Dollars; that the [fol. 62] petitioner may be admitted to bail pending the determination of the appeal in the Supreme Court.

Terrence Druggan, by Michael J. Ahern, Attorney for Petitioner. Thomas D. Nash, Michael J. Ahern, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 22, 1925

And now comes petitioner—appellant, by Thomas D. Nash and Michael J. Ahern, his attorneys, and in connection with his petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the trial of the above entitled cause in said District Court, error has intervened to his prejudice and petitioner—appellant here assigns the following errors, to-wit:

1. Said District Court erred in dismissing the petition for habeas corpus.

2. Said District Court erred in not holding that the petitioner—appellant, is wrongfully held and illegally imprisoned.

3. Said District Court erred in not holding that this petitioner—appellant, is held and imprisoned without due process of law and in violation of the Fifth Amendment of the Constitution of the United [fol. 64] States.

4. Said District Court erred in holding that the National Prohibition Act was a constitutional and valid Statute.

5. Said District Court erred in holding that Title II of the National Prohibition Act, except Sections 1, 27, 37 and 38 thereof, is a constitutional and valid Statute.

6. Said District Court erred in holding that the injunctional order, upon which the contempt proceedings were founded, was a valid order. The said order provided

"that pending the final hearing and determination, and until the conclusion of the trial of said bill for injunction against said nuisance, no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of."

The Court erred in so holding for the following reasons:

A. That there was no provision or recital in said injunctional order restraining petitioner from removing any liquor or other property from said premises;

B. That the injunction for contempt set forth three overt acts, each specifically relating to an alleged removal of liquor from said premises;

C. That in contempt proceedings, under Section 24 of Title II of the National Prohibition Act, the particular recital of the Injunctional Order upon which such proceedings are founded, is by implication incorporated in Section 24, as fully as though word for word set forth;

D. That the jurisdiction of the District Court to entertain said contempt proceedings was based upon said Section 24;

E. That the jurisdiction of the District Court in the contempt proceeding in the instant case was defined by the terms of the injunctional order and did not reach acts of removal which were not included in the particular restraints and inhibitions set forth in [fol. 65] the injunctional order;

F. That the District Court was without jurisdiction under Section 24 of Title II of the Prohibition Act, to proceed under an information for contempt, charging acts of removal not specifically restrained by the injunctional order.

7. Said District Court erred, in holding that the National Prohibition Act, excepting only Sections 1, 27, 37 and 38 of Title II thereof, upon which said Act, said judgment and conviction were based, is a valid and constitutional law; for the said Act is unconstitutional for the following reasons:

A. That section 1 of the Eighteenth Amendment to the Constitution of the United States, provides:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the im-

portation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited;"

B. That the Eighteenth Amendment was proposed to the legislatures of the several States by the Sixty-fifth Congress, on the 19th day of December, 1917, and was, on the 16th day of January, 1919, ratified by the legislatures of three-fourths of the whole number of States in the United States and certified by the acting Secretary of State as valid to all intents and purposes as a part of the Constitution of the United States;

C. That the Supreme Court of the United States, in Dillon vs. Glos, 256 U. S. 368, declared that the Eighteenth Amendment to the Constitution of the United States went into effect on January 16th, 1920;

D. That under Section 1 of the Eighteenth Amendment prohibition did not become effective and operative until one year from the date of its adoption by three-fourths of the whole number of States, that is to say, it became effective and operative on January 16, 1920;

[fol. 66] E. That Congress was without constitutional power to legislate upon the subject of prohibition of intoxicating liquors until the Eighteenth Amendment became operative on January 16, 1920;

F. That the National Prohibition Act was passed over the President's veto on October 28, 1919, nearly three months before said amendment became operative;

G. That Title II of the National Prohibition Act having been passed prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void;

H. That there is no provision in the Eighteenth Amendment giving to Congress power to legislate with reference to the subject-matter of said Amendment prior to its effective date.

8. Said District Court erred in holding as valid and constitutional, Section 24 of Title II of the National Prohibition Act—the contempt Section upon which the judgment complained of is founded. The court erred in so holding, for the following reasons:

A. That said Section 24 of Title II fixes an arbitrary maximum and minimum penalty, regardless of the degree of fault of the contemnor and is for that reason an unconstitutional interference with and invasion of the judicial power.

B. That the discretion of the chancellor in assessing penalties upon contemnors is destroyed by this section;

C. That the District Courts from their creation by the Act of 1831 came into existence clad with plenary power to vindicate their authority and to punish contemnors;

D. That said section 24 invades, supersedes, limits and restricts the inherent plenary power of the District Courts to assess the penalty for contempts of their authority and is, therefore, an unconstitu- [fol. 67] tional interference with and invasion of the judicial power;

E. That said section 24 in its definition of an arbitrary maximum and minimum punishment without regard to the extent of the contemnor's fault is the creation of a new statutory crime to be tried by a court of equity without a jury and upon affidavits without confrontation of witnesses in violation of the Sixth Amendment to the Constitution of the United States.

9. Said District Court erred in not holding that the injunctional order, upon which the contempt proceedings were based, was obtained and granted without notice first given to petitioner and for that reason was illegal and void. The court erred in this for the following reasons:

A. That Equity Rule 73 provides that

"No preliminary injunction shall be granted without notice to the opposite party;"

B. That under sections 913 and 917 of the Revised Statutes the Equity Rules are given the same force and effect as Acts of Congress;

C. That section 22 of Title II of the National Prohibition Act, under which the bill for injunction aforesaid was instituted, provides that

"Such action shall be brought and tried as an action in equity," etc;

D. That Equity Rule 73 applies to bills brought under section 22 of Title II of the National Prohibition Act;

E. That the non-compliance with Equity Rule 73 went directly to the jurisdiction of the court to grant the temporary injunction aforesaid;

F. That the injunctional order so violating Equity Rule 73 is void and all of the contempt proceedings thereon and the judgment, sentence and fine therein are likewise null and void and of no legal effect whatever.

[fol. 68] 10. Said District Court erred in not holding that the judgment for contempt was void and illegal, for the following reasons:

A. That a judgment for contempt is void unless the facts found to be contemptuous are recited in the judgment order or incorporated therein, by reference to the moving papers, which, in turn, must recite sufficient facts to establish prima facie a contempt;

B. That said judgment order found your petitioner guilty 'as charged in the information', but your petitioner shows, that, in addition to three acts of removal described in said information, he was charged therein with 'otherwise disposing of said beverage' without

further description or recital of any acts or facts which might be embraced by the term 'otherwise disposing of';

C. That said judgment order in finding your petitioner guilty as charged in said information included a finding that he was guilty of 'otherwise disposing of' without reciting any facts which would constitute 'otherwise disposing of' either in the order itself or by reference to the moving papers;

D. That said judgment as to such finding is void.

11. Said District Court erred in not holding that the judgment order in the contempt case was void in its entirety, for the following reasons:

A. That the sentence imposed was an integral part of said judgment order;

B. That it was a unit and fixed a joint and nonseverable penalty for all of the acts of which your petitioner was found guilty, including the alleged act of 'otherwise disposing of said beverage';

[fol. 69] C. That said judgment as to said last mentioned finding was void and that therefore said judgment order in its entirety was void in that it fixed an aggregate penalty on the several findings, one of which at least is void.

By reason whereof this petitioner-appellant, prays that said judgment may be reversed and that he be ordered discharged.

Thomas D. Nash, Michael J. Ahern, Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

[fol. 70] Bond on Appeal for $500—Approved and filed April 28, 1925; omitted in printing

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[fol. 71] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed April 29, 1925

To the Hon. Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Please prepare record in above entitled cause to be filed in the Supreme Court of the United States and include therein the following, to wit:

1. Placita.
2. Petition for writ of habeas corpus.
3. Demurrer to petition.

4. Order and judgment sustaining demurrer and dismissing petition.
5. Petition for appeal and assignments of error.
6. Order allowing appeal.
7. Bond.

Respectfully yours, Thomas D. Nash, Michael J. Ahern, Attorneys for Petitioner.

Received a copy of the foregoing Præcipe this 29th day of April, 1925.

Edwin A. Olson, M. I., United States District Attorney.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled Terrence Druggan vs. Palmer E. Anderson, United States Marshal for the Northern District of Illinois, Eastern Division and Wesley Westbrook, Superintendent of the Cook County Jail of Cook County, Illinois, No. 35185, as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 29th day of April, A. D. 1925.

Charles M. Bates, Clerk. (Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.)

Endorsed on cover: File No. 31,116. N. Illinois D. C. U. S. Term No. 415. Terrence Druggan, appellant, vs. Palmer E. Anderson, United States marshal, etc., and Wesley Westbrook, superintendent of the Cook County jail of Cook County, Illinois. Filed May 2nd, 1925. File No. 31,116.

DENIED
JUN 1 - 1925
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Office Supreme Court, U. S.
FILED
MAY 22 1925
WM. R. STANSBURY
CLERK

No. [redacted] 415

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. [redacted] 1925

TERRENCE DRUGGAN,
Appellant-Petitioner,
vs.
PALMER E. ANDERSON, U. S. Marshal for the Northern District of Illinois, and WESLEY H. WESTBROOK, Jail Superintendent of the County Jail, Cook County, Illinois,
Appellees-Respondents.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
J. H. Wilkerson,
District Judge
Presiding.

Motion to Admit Appellant-Petitioner to Bail Pending Appeal, or in the Alternative to Advance Cause for Hearing and Suggestions in Support Thereof.

THOMAS D. NASH,
MICHAEL J. AHERN,
Counsel for Appellant-Petitioner.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1924.

No. 1151.

TERRENCE DRUGGAN, Appellant-Petitioner, vs. PALMER E. ANDERSON, U. S. Marshal for the Northern District of Illinois, and WESLEY H. WESTBROOK, Jail Superintendent of the County Jail, Cook County, Illinois, Appellees-Respondents.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable J. H. Wilkerson, District Judge Presiding.

MOTION TO ADMIT APPELLANT-PETITIONER TO BAIL PENDING APPEAL, OR IN THE ALTERNATIVE TO ADVANCE CAUSE FOR HEARING.

MOTION.

Comes now Terrence Druggan, appellant-petitioner, by Thomas D. Nash and Michael J. Ahern, his counsel, and moves the court for admission to bail pending his appeal.

In the event said motion is at this time denied, appellant-petitioner in the alternative, moves the court to advance said cause for hearing and shows to the court that said cause is here pending on appeal allowed to this court by the District Court of the United States for the

Northern District of Illinois, Eastern Division, from an order and judgment of said court dismissing the petition for a writ of habeas corpus filed in the District Court by said appellant-petitioner; that said petition for a writ of habeas corpus was filed to review the judgment of said District Court, sentencing appellant-petitioner to one year in the House of Correction for contempt of court; that appellant-petitioner has served six months of said sentence and unless bail is granted, or said cause is advanced for hearing, appellant-petitioner will have served the remainder of said sentence before said cause is reached in its regular order. Appellant-petitioner further shows to the court that the matter involved is one of general public interest and that the only question in issue on said appeal is the question of the jurisdiction of said District Court, and that it is provided by Rule 32 of this court that cases which involve only the question of the jurisdiction of the court below will be advanced on motion.

Thomas A. Nash

Michael J. Ahern

Counsel for said Appellant-Petitioner.

SUGGESTIONS OF THE APPELLANT-PETITIONER IN SUPPORT OF HIS MOTION FOR BAIL.

STATEMENT OF FACTS.

The appellant, Terrence Druggan, hereinafter called the petitioner, moves for admission to bail pending the determination of the appeal of your petitioner, allowed to this court by the District Court of the United States for the Northern District of Illinois, Eastern Division, from the order and judgment of that court dismissing his petition for a writ of habeas corpus. Petitioner was sentenced to imprisonment for one year and fined one thousand ($1,000) dollars in a prosecution for contempt of court under Section 24*, of Title II of the National Prohibition Act. The material portions of the injunctional order upon which the contempt proceeding was founded recite (Rec., ...):

> "And now, on this 7th day of February, A. D. 1924, this cause coming on to be heard upon the bill of complaint heretofore filed in this court, and upon the affidavits of Edwin A. Olson, Brice F. Armstrong, and John W. Fonner, duly filed in open court, and it appearing to the satisfaction of the court by inspection of the bill and said affidavits and otherwise, that a nuisance under the National Prohibition

*Sec. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

Act exists as described in said bill, on the premises hereinafter described, it is

Ordered, that pending the final hearing and determination, and until the conclusion of the trial of said bill of injunction against said nuisance, no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of, in or upon the premises, or any part thereof, located in the City of Chicago at West Roosevelt Road and South Campbell avenue, County of Cook, State of Illinois, * * *; and that all of the defendants, the Standard Beverage Corporation, B. J. Bowman, * * * Terrence Druggan * * * be restrained and enjoined from keeping, using, maintaining, dealcoholizing, or otherwise permitting and aiding, abetting, or assisting the keeping, using, or maintaining of said premises as a place where intoxicating liquor is manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of in violation of Title II of said National Prohibition Act, and that said defendants, and the others above mentioned, be commanded not to overlook, neglect or fail to prevent such use or maintenance of said premises."

The information for contempt contains by way of recital the enjoining portion of the injunctional order above quoted. It then charges the defendants, therein mentioned, with having removed from the premises of the Standard Beverage Company on three separate occasions a large number of barrels of beer; after specifying these three overt *acts of removal,* it goes on to recite that the defendants "Did then and there manufacture, sell, keep, barter, dealcoholize *and otherwise dispose of** said beverage." (Rec., ...)

The judgment order of the court recited no findings of fact, but found the defendants, therein mentioned, "guilty of contempt of court of violating the temporary injunction, *as charged in said injunction.*" (Rec., ...)

As grounds for the admission of petitioner to bail, the following suggestions are respectfully submitted:

*Italics throughout are ours.

SUGGESTIONS ON THE MOTION FOR ADMISSION TO BAIL.

Point I.

A.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war time powers of Congress.

Leaving out of consideration of this brief, Sections 1, 27, 37 and 38 of Title II aforesaid, for they in nowise affect the rights of the petitioner herein, the contention of the petitioner that Title II of the National Prohibition Act is unconstitutional and void, may be reduced to the following syllogistic form:

A. The Eighteenth Amendment to the Constitution of the United States went into effect and became operative as a part of the Constitution of the United States on January 16, A. D. 1920.

Dillon v. *Glos*, 256 U. S. 368, 65 Law Ed. 994.

B. The Government of the United States is a Government of limited and defined powers. All national authority is derived from the Constitution of the United States, in which the powers of the Federal Government are enumerated.

12 C. J. p. 742, Sec. 156, and U. S. Sup. Ct. cases there cited.

Conclusion—Title II of the National Prohibition Act, having been passed October 27, 1919, prior to the time

when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void.

The point here involved is not that a Legislative body may not pass a law *in praesenti* to become effective *in futuro.* The law is well settled that a Legislative body having power to legislate over a particular subject-matter may pass laws to become operative at a future date or on the happening of a future event; neither are anticipatory State statutes forbidden, unless there is, by the terms of the Constitution, a limitation on the Legislature to pass them. The objection here made, is, not that Congress passed the Volstead Act to go into effect *in futuro,* but that it passed it at all, at the time when it did pass it; that it had no power whatever, under the Federal Constitution, to pass any legislation with respect to the Eighteenth Amendment, until that amendment became effective and operative, as a part of the Constitution of the United States.

It is not here contended that the Eighteenth Amendment is unconstitutional; neither is it contended that Congress did not derive the power, impliedly, from Section I of the Eighteenth Amendment and, expressly, from Section II of the Eighteenth Amendment to enact legislation to make the amendment effective. It is conceded that Congress derived such power from the Eighteenth Amendment, but it is contended that at the time the National Prohibition Act was passed, such power was merely inchoate and *not vested* until January 16, 1920.

In *Dillon* v. *Glos,* 256 U. S. 368, 65 L. Ed. 994, the court said:

> "The provisions of the Act, which the petitioner was charged with violating, and under which he was arrested (Title II, Secs. 3, 26), were by the terms of

> the Act (Title III, Sec. 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter *by its own terms* was to *go into effect* one year *after* being ratified. *Its ratification,* of which we take judicial notice, was consummated January 16, 1919." (Italics ours.)

That Congress regarded the Eighteenth Amendment as inoperative and ineffective until one year after its ratification, is clear from the language of Section 3 of Title II of the National Prohibition Act, which reads:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States *goes into effect,* etc., etc."

Likewise is it clear, from the language of Section 21 of Title III of the National Prohibition Act, which reads:

> "Titles I and III and Section 1, 27, 37 and 38 of Title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of Title II shall take effect and be in force *from and after the date when* the Eighteenth Amendment to the Constitution of the United States *goes into effect.*"

That the Eighteenth Amendment did not become effective at the time of its ratification seems to be recognized also in the National Prohibition cases, 253 U. S. 350, when the court, in the 10th conclusion of its opinion, in referring to the power confided to Congress by Section II of the Eighteenth Amendment, said:

> "That power may be exerted against the disposal for beverage purposes of liquors manufactured *before the amendment became effective,* just as it may against subsequent manufacture for those purposes."

Likewise, in *Street* v. *Lincoln Safe Deposit Company,* 254 U. S. 88, the court said that the Eighteenth Amendment did not indicate

> "any purpose to confiscate liquors lawfully owned

> at the time the amendment *should become effective* and which the owner intended to use in a lawful manner."

Title II of the National Prohibition Act is, what is known as contingent legislation. The general rule with regard to contingent legislation is that a Legislature, whether state or national, *having the power* to pass a law *in praesenti* may make it effective *in futuro;* and with regard to many things what it may do immediately it may also do mediately; as was said in the *People* v. *Reynolds,* 10 Ill. (5 Gil.), p. 1, at p. 10:

> "Necessarily, regarding many things especially affecting local or individual interests, the Legislature may act either mediately or immediately."

See also *Ex parte* Wall, 48 Cal. 279 (315). The converse of this proposition ought also to be true, viz.: what a legislative body cannot do immediately it cannot do mediately; or, if a legislative body cannot pass an Act to become effective in the present, it cannot, in the present, pass an Act to become effective in the future, except that in most of the states, the several constitutions specifically provide for legislation, except in emergency cases, to become effective at a date subsequent to passage. A state legislature, when not otherwise limited by the state constitution, has a present plenary power to legislate, and may therefore pass an Act to become effective immediately or in the future, as it sees fit. Congress also, acting **under powers already granted** by the Constitution, may pass laws to become effective immediately or in the future, as it sees fit; but where Congress has not the power to pass an act **effective immediately,** it should not be held to have authority to pass an Act, effective in the future, when it would receive such authority.

Certain it is that Congress has no power to make

Title II effective immediately. The inhibitions of the National Prohibition Act which became effective immediately on the passage and approval of that Act, were "permissible *only because* in the opinion of Congress the war emergency demands it." *Ruppert* v. *Caffey*, 251 U. S. 264 (301). Not having the authority to pass Title II to become effective immediately, Congress had no power to pass Title II at all on October 27, 1919, for it could not anticipate the grant of power conferred by an Amendment which was not to go into effect until January 16, 1920. What it could not do immediately, it could not do mediately; what it could not do presently, it could not do prospectively. If it had power to pass an Act effective in the future, it had power to pass such Act effective in the present. If the latter power be denied, so also must the former be denied.

The decision in *Dillon* v. *Glos*, 256 U. S. 368, 65 L. Ed. 994, to the effect that the Eighteenth Amendment went into effect one year after its ratification, is supported by a number of decisions construing statutory enactments, and, we see no reason why the same rules of construction as are applied to a statute, should not be applied to a constitution or a constitutional amendment. A valid statute is just as much the law as is a valid constitutional amendment. Applying then the rule, as applied to statutes, it can safely be said that the constitutional amendment did not become the law of the land upon its ratification January 16, 1919, but became the law of the land only when it went into force and effect on January 16, 1920. That the Eighteenth Amendment did not become the law of the land until January 16, 1920, and that until then it granted no power, conferred no authority and imposed no obligation or duty, will more fully appear from the cases hereafter cited and quoted from.

"A statute has not, *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect."

Neisel v. *Moran*, 85 So. 346 (359).

Gilbert v. *Ackerman*, 53 N. E. (N. Y.) 753.

In re Howe, 19 N. E. (N. Y.) 513.

36 Cyc. 1192, Notes 6, 7.

City of Davenport v. *R. R. Co.*, 37 Ia. 624.

Jackman v. *Garland*, 64 Me. 133.

"A statute passed to take effect at a future day, is to be understood as speaking from the time it goes into operation, and not from the time of its passage."

Price v. *Hopkins*, 13 Mich. 318.

Rice v. *Ruddiman*, 10 Mich. 125.

"No statute has, *ex proprio vigore*, any force until it becomes the law of the land."

Cargill v. *Power*, 1 Mich. 369, 370.

Charless v. *Lamberson*, 1 Ia. 435, (443).

State v. *Bentley*, 101 Pac. (Kan.) 1073.

Shook v. *Laufer*, 100 S. W. (Tex. Civ. App.) 1042.

State v. *Williams*, 90 N. E. (Ind.) 754.

Mills v. *State Board*, 98 N. W. (Mich.) 19.

"Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the executive has no force whatever for any purpose."

36 Cyc. 1192, Notes 6, 7.

State v. *R. R. Co.*, 93 Pac. (Mont.) 945, 15 L. R. A. (N. S.) 134; text 138.

See also:

In re Alexander, 44 So. (Fla.) 175.

Thompson v. *State*, 47 So. (Fla.) 816.

Neisel v. *Moran*, *supra*.

Schneider v. *Hussey*, 1 Pac. (Idaho) 343.
Harding v. *People*, 15 Pac. (Colo.) 727.
Churchill v. *Bemis*, 64 N. W. (Neb.) 348.
Rogers v. *Voss*, 6 Ia. 405.
Scales v. *Marshall*, 70 S. W. (Tex.) 945.
State v. *Mounts*, 14 S. E. (W. Va.) 407.

In *State* v. *Dircks*, 111 S. W. (Mo.) 1, the court said:

> "While the amendment *became a part* of the Constitution of this State from the time of the canvass of the vote thereon by the Secretary of State in 1906, *by its terms*, it was not to have actual operation and practical effect, until the election in 1908, the first time when an election for sheriff was to be held under its provisions. That a statute or constitutional provision may have a *potential existence*, but which will not go into actual operation until a future time, is familiar law."

In *Seneca Mining Co.* v. *Secretary of State*, 47 N. W. (Mich.) 25, the court, at page 26, said:

> "Without the authority conferred upon the legislature by this amendment to the Constitution, the Legislature would have no authority to authorize the extension of corporate existence, such as this. The important question, which is, therefore, presented is, when would the amendment adopted by the electors in April, 1899, *take effect as a part of the Constitution?* We must look to that instrument for a reply." (Italics ours.)

In *State ex rel. Stevenson* v. *Tufley*, 22 Pac. (Nev.) 1054, the court said:

> "An act of the Legislature which is not authorized by the State Constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence."

Speaking of the effective date of a constitutional amendment, the court, in *People* v. *Gardner*, 59 Barb. 198, at p. 205, said:

> "It is suggested that the new judiciary article (Article 6, *supra*) was 'adopted' when the state canvassers had completed their canvass of the votes. Undoubtedly the electors had adopted the article. They had done all they were authorized by law, to do; but the article was not to become law until a future day. Until that time arrived it was silent and affected no one."

This last case was affirmed in *People* v. *Gardner*, 45 N. Y. 812, where the court, in referring to Article 6, *supra*, which was adopted by the people in November, 1869, said, page 814:

> "* * * the new judiciary article took effect upon the first day of January, 1870, and on and from that day *became operative* as a provision of organic law."

To the same effect, see *People* v. *Norton*, 59 Barb. Sup. Ct. Rep. (N. Y.) 169; *Real* v. *People*, 42 N. Y. 270.

In *Correllis* v. *State*, 82 So. (Fla.) 601, the court had under consideration an amendment to the State Constitution, which prohibited the manufacture, sale, etc., of intoxicating liquors. The constitutional amendment was in three sections and is substantially similar in all respects to the Eighteenth Amendment to the Constitution of the United States. Among other things, the court said:

> "**By the terms** of this amendment it was to 'go into effect on the first day of January, A. D. 1919.' This of itself rescued the amendment from the provisions of Article 17, by which amendments to the Constitution become effective upon receiving the approving majority of the votes of the electors at the election * * *."

This case was followed by *Neisel* v. *Moran*, 85 So. (Fla.) 346. This case is substantially on all fours with the case now presented by the petitioner. The prohibition amendment to the Constitution of Florida is

substantially similar in all respects to the Eighteenth Amendment. The act of the Florida Legislature to make effective the amendment to the Florida Constitution is, or was, at the time this decision was rendered, substantially similar to the National Prohibition Act and was passed, as was the Volstead Act, in anticipation of the amendment becoming effective. The Florida act was declared constitutional, however, but it was found to be valid because of the plenary power residing in State legislatures to pass any law *not forbidden* by the State Constitution. In making this case applicable to the contention of the petitioner here made, it is important to note the distinction made by the Florida court between Federal power and State power. At page 360 (85 So. 346), the court said:

> "The Supreme Court of the United States has held the act of Congress of October 28th, 1919, known as the Volstead Prohibition Enforcement Act, to be a valid law, *although it was passed by Congress before the Eighteenth Amendment to the Federal Constitution became effective,* on January 16th, 1920, and although Congress *has no Legislative power except such as is granted* to or conferred upon it by the Constitution of the United States. *Rhode Island* v. *Palmer,* 252 U. S. ——, 40 Sup. Ct. 486. If the Volstead Federal Enforcement Statute, enacted October 28th, 1919, after the Eighteenth Amendment to the Federal Constitution had been adopted by the Legislatures of three-fourths of the States of the Union, *but before the amendment became effective,* January 16th, 1920, is a valid law, *when the Congress has no power* to enact laws, except as that power is granted by the Federal Constitution, then Chapter 7736, Laws of Florida, is a valid law, for the reason that the Legislature may enact any statute that is not forbidden by the State or Federal Constitution, etc."

Rhode Island v. *Palmer,* cited by the court, *supra,* was not decided in 252 U. S., but was one of the national pro-

hibition cases decided in 258 U. S. 350, and the court was under a misapprehension, when it took for granted, that the point in question was decided by the Supreme Court of the United States in that case. We have already pointed out, at the outset of this Brief and Argument, that the point made by the contention of the petitioner herein, was not decided in *Rhode Island* v. *Palmer*, or in any other case decided by the Supreme Court of the United States, which we have been able to find. It is worthy of note that the Florida court, apparently wishing to emphasize the correctness of its holding, drew the *a fortiori* conclusion, that if Congress, *without power* granted to it by the Federal Constitution, could pass a law, in anticipation of receiving that power, when the Eighteenth Amendment should become effective, then the Legislature of Florida had a right to pass the Statute in question. The language of the court signifies to our mind that the court, under the misapprehension that this point was decided by the Supreme Court of the United States, at least doubted the correctness of the decision, which it thought the United States Supreme Court had rendered in that case. In *Dunn* v. *County of Rock Island*, 283 Ill. 628 (636), it is said:

> "Upon the facts stated it is argued that if the Act prevents the building of the jail it is retroactive and an interference with constitutional rights. The act did not go into effect until July 1st, 1915, but under section 10* of Article 5 of the Constitution the act *became a law* of the State *upon its approval* by the Governor. The Act is to be construed as prospective, and its prohibition was not effective until July 1st, 1915. A statute passed to take effect at a future day is operative from that day and the intervening period is allowed to enable the public to become acquainted with its provisions, but until it *becomes operative as a law* the public are not compelled to govern their actions by it."
>
> ——*Misprint for Section 16.

See, also, *Board of Supervisors* v. *Keady*, 34 Ill. 293.

In *Pratt* v. *Allen*, 13 Conn. 119, the court said, at page 125:

> "The objection is, that since the amendment giving the election of sheriffs to the people, also directs that such election shall be made, in such manner as shall be prescribed by law, the Assembly must derive their power from this amendment; and as the Act of May, 1838, was prior to the final adoption of the amendment by the people, it was prior to the existence of power in the assembly, and so the act is void; in other words, that the amendment was a grant of power to the Legislature to legislate upon the subject; and that until the amendment received its consummating act, by the vote of the people, no power was conferred by it upon the Legislature. The objection proceeds upon the assumption that the Constitution of this State, *like that of the United States* confers upon the legislative department all the power it possesses; whereas, the fact is not so. The Constitution of the United States is a grant of powers, *where they did not before exist*; the Constitution of this State is a *limitation* of powers already existing."

In *Owing* v. *Speed*, 5 Wheaton Rep. 420, Chief Justice Marshall held that an act, passed by the State of Virginia, with reference to certain lands was not void as being in conflict with Section X of Article I, of the Federal Constitution, prohibiting a state from passing "any law impairing the obligation of contracts." In urging this case, in support of the contention of the petitioner, we call the court's attention to the fact that Article 7, of the Constitution of the United States provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." Virginia was among the nine States first ratifying. New Hampshire was the ninth State to ratify and this it did, June 21st, 1788, and thereupon the Constitution of the

United States became established. Subsequently, but before March 4th, 1789, the act of the Virginia Legislature was passed, but it was held to be valid because the Constitution of the United States in its entirety did not go into effect until March 4th, 1789.

In 28 Cyc., p. 365, it is said:

> "A municipal charter in whatever form is a statute of the State, and the organic law of the corporation. It gives the municipality its power to enact by-laws, just as the Federal Constitution gives the Congress its power of legislation."

Bearing in mind this analogy between the power of a municipality and the power of Congress, we cite the case of *Ellis* v. *City of Cleburne*, 35 S. W. (Tex.) 495, (writ of error denied by the Supreme Court.) The Constitution of Texas provided that—

> "If it shall appear from the election returns that a majority of votes have been cast in favor of any Constitutional Amendment, the said Amendment *shall become a part* of the Constitution and proclamation shall be made by the Governor thereof."

The court held that an amendment to Article 8 of the Constitution, authorizing certain cities to incur indebtednesses for the erection of water works, which was adopted by a vote of the People on August 14, 1883, and the result proclaimed by the Governor on September 25, 1883, was not *in effect* on September 13, 1883, so as to authorize a city *on that date* to incur an indebtedness for the erection of certain water works. The court held in substance the following propositions:

> A. An Ordinance is without authority and void which is passed in anticipation of a Constitutional Amendment, which, when effective, would confer such authority.
>
> B. A contract made by the City was not valid by reason of having been made in anticipation of the adoption of the Amendment.
>
> C. If the Ordinance, authorizing the execution of

the contract, was enacted *before* the Constitutional Amendment *became operative,* and was, therefore, invalid, the contract based upon the Ordinance was likewise void, even though it was not delivered until October 1, 1883, after the Amendment became operative.

D. A City cannot ratify a contract which at the time it was entered into was *ultra vires.* A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. (Citing Dillon on Municipal Corporations, 4th Ed., Sec. 463.) No subsequent Act can make an *ultra vires* contract effective.

To the same effect, see *Reade* v. *City of Durham,* 92 So. (N. C.) 712; *City of Duluth* v. *Duluth St. Ry. Co.,* 62 N. W. (Minn.) 267.

We have cited and quoted excerpts from the principal cases supporting the contention of the petitioner. Other cases to which we respectfully refer the court are:

Price v. *Hopkins,* 13 Mich. 318.

Bilbrey v. *Poston,* 63 Tenn. 232.

Girdner v. *Bryan,* 67 S. W. (Mo.) 699.

Phy v. *Wright,* 146 Pac. (Ore.) 138.

Schwartz v. *Leiberman & Co.,* 2 Tex. App. Civ. Cases, Sec. 289.

Hamilton v. *Vaughan,* 170 N. W. (Mich.) 554.

DeWar v. *People,* 40 Mich. 401.

State v. *Cain,* 28 So. (La. Ann.) 226.

State v. *Schnitzer,* 95 Pac. (Wyo.) 698.

State v. *Kyle,* 65 S. W. (Mo.) 763.

Lloyd v. *Hamilton,* 27 So. (La. Ann.) 275.

Point I.

B.

Objections Answered.

(1) The Supreme Court of the United States has not had this objection to the validity of Title II of said act presented to it in any case heretofore arising. It was not passed upon in *Rhode Island* v. *Palmer*, or any of the other cases included within the *National Prohibition* cases, 253 U. S. 350. In those cases the contention that the Volstead Act was invalid, was, as we read the decision, based upon the major contention that the Eighteenth Amendment itself was unconstitutional. The court at the outset in those cases said:

> "We here are concerned with seven cases involving the validity of that amendment and of certain general features of the National Prohibition Law, known as the Volstead Act."

Mr. Justice McKenna, in his dissenting opinion, said:

> "This case is concerned with the Eighteenth Amendment to the Constitution of the United States, its validity and construction."

Neither was it decided in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 164. The contention there was that the Eighteenth Amendment denied to Congress, before its effective date (January 16, 1920), the power to pass any prohibition of the liquor traffic, the argument being that the amendment guaranteed to manufacturers and dealers a year's grace. The decision of the court (p. 164) was to the effect that the Eighteenth Amendment was not a denial of the war power of Congress; the only point decided was that Congress had power to pass such prohibition *as a war measure* for the conservation of the resources of the country, and that the Eighteenth

Amendment did not operate to destroy or curtail that power.

In *Ruppert* v. *Caffey*, 251 U. S. 264, Elihu Root and William D. Guthrie argued that:

> "The language of the Eighteenth Amendment presents a very grave question as to the power of Congress to enact prohibition legislation *effective before* the expiration of one year from the ratification of that amendment."

It will be noted that the objection merely went to the power of Congress to pass such legislation *effective immediately*, and involved only Title I of the Volstead Act, counsel taking it for granted that Title I was passed pursuant to the provisions of the Eighteenth Amendment. The objection did not assert the lack of a then present power in Congress to legislate at all on the subject. The court held that Title I was not passed pursuant to the Eighteenth Amendment, but pursuant to the war powers of Congress. The court said, page 301:

> "Prohibition of the manufacture of malt liquors with an alcoholic content of one-half of one per cent or more, is permissible *only because* in the opinion of Congress the war emergency demands it."

Objections Answered (Cont'd).

(2) Article 5 of the Constitution of the United States, which provides that amendments when ratified by the Legislatures of three-fourths of the states "shall be valid to all intents and purposes, as part of this Constitution," in nowise negatives the construction here contended for by petitioner, viz: that the Eighteenth Amendment did not become *an operative* or *effective* part of the Constitution until January 16, 1920. Such construction is consistent with the provisions of Article 5. If the Eighteenth Amendment had specified no time when it was to go into effect, it undoubtedly would have become operative, immediately upon its ratification under the provisions of Article 5. To paraphrase the language of the Supreme Court of Florida, in *Correllis* v. *State,* 82 So. (Fla.) 601, (heretofore quoted):

> "By the terms of this Amendment it was to go into effect on the 16th of January, 1920. This of itself rescued the Amendment from the provisions of Article 5."

The Eighteenth Amendment upon its ratification became no doubt a part of the Constitution and was valid to all intents and purposes, but until January 16th, 1920, it did not go into effect; it was unenforceable; it did not become an *operative* part of the Constitution; it lay dormant; suspended; *ex proprio vigore* it had no force; its existence as law was potential; it was silent and affected no one; it vested no power. The situation presented has its analogy in state statutes and state constitutional amendments. Speaking of a constitutional amendment the court in *State* v. *Cain,* 28 So. (La. Ann.) 226, said:

> "* * * it and every part of it was intended to lie dormant and directed to lie dormant until, etc.; * * * everything pertaining to the article, * * * was suspended until, etc."

And the court, in *State* v. *Dircks,* 111 S. W. (Mo.) 1, (*supra*), also speaking of a constitutional amendment, said:

> "While the amendment *became a part* of the Constitution from the time of the canvass of the votes, * * * *by its terms,* it was not to have actual operation and practical effect until, etc. * * * That a statute or *constitutional provision* may have a *potential existence,* but which will not go into actual operation until a future time, is familiar law."

State statutes are generally passed and approved prior to their effective dates. By the Constitution of Illinois, for instance, laws take effect on the first day of July next after their passage, unless an emergency exists. After their passage and approval they become *a part* of the statutes of the State, and unless they offend against some constitutional provision, they become valid law; but until the time arrives when they shall go into effect, they confer no power, speak with no authority, are silent and affect no one. Such was the holding in *Dunn* v. *County of Rock Island,* 283 Ill. 628 (636 heretofore quoted). In the case last cited, it was held that until a law becomes operative as a law the people are not compelled to govern their actions by it.

So with the Eighteenth Amendment. It became a part of the Constitution under Article V upon its ratification, but it did not *become operative* as law until, by its own terms, it went into effect January 16th, 1920. The intervening period was allowed to enable the public to become acquainted with its provisions, and to adjust itself to its inhibitions. During that period it was apparently intended by the legislatures of those States which ratified it, to be altogether operative or else altogether inoperative. There is no language in any of its sections which would make it operative for one purpose and inoperative for another. Nowhere does it specify that

Congress should have authority to pass legislation under it to become effective prior to the expiration of the one year period of limitation fixed in section 1. Certain it is, at least, that the amendment as law was inoperative to grant Congress power to enact Title II of the National Prohibition Act to become effective immediately on its passage. As it was inoperative for that purpose, it was, during the period between ratification and January 16th, 1920, inoperative altogether. Congress, having no constitutional authority to enact Title II of the Volstead Act to become effective immediately, had no constitutional authority in October, 1919, to make Title II effective in the future. As heretofore stated, a State Legislature under its plenary power may enact a statute which, while it becomes law immediately upon passage and approval, does not come to life until the time fixed by the State Constitution; but unlike a State Legislature, the very power of Congress to legislate does not come to life or into being until a constitutional amendment goes into effect.

Under Article V of the Constitution, the Eighteenth Amendment upon ratification might have become "valid to all intents and purposes as part of this Constitution" without having granted to Congress any power whatever. Witness for instance the Ninth, Tenth and Eleventh Amendments, which are completely self-executing in their provisions and in their nature, grant no power to Congress and yet became "valid as part of the Constitution" upon ratification. Suppose that the Eighteenth Amendment had been submitted and ratified in such form as to be completelyself-executing in its provisions, with its present Section 1, unaltered and an added provision specifically denying to Congress power to legislate on the subject of intoxicating liquors. Or suppose such amendment without a provision specifically deny-

ing that power of Congress; for, if the amendment were completely self-executing, it would impliedly deny such power to Congress anyway. Would anyone doubt, but that, upon ratification, the amendment, as supposed, became "valid to all intents and purposes as part of this Constitution" under Article V? And would anyone doubt but that also such amendment, while "valid as a part of the Constitution" upon ratification, remained inoperative until January 16th, 1920? If the amendment, as supposed, could deny power altogether to Congress to legislate, and, at the same time, be consistent with Article V, then there is no good reason why the amendment, as ratified, was not consistent with Article V, while remaining inoperative to grant power to Congress to legislate until January 16th, 1920. In fact, if the self-executing provisions of the amendment, as supposed, would remain inoperative until January 16th, 1920, it would seem, *a fortiori*, that the power granted to Congress, by the amendment as ratified, to execute its provisions, should remain inoperative until January 16th, 1920.

Perhaps the situation presented by the Eighteenth Amendment in its relation to Article V of the Constitution can best be described as being comparable to the National Bankruptcy Act in its relation to State Insolvency Statutes. The going into effect of a Federal bankruptcy act automatically *suspends* the operation of a state insolvency statute covering the same ground. It is said in 14 R. C. L., p. 633:

> "But a State statute is not thereby repealed; its *operation is only suspended* during the period the national act remains in force. On the repeal of the Bankruptcy Act a State insolvency statute comes in operation without re-enactment and applies to acts occurring during its suspension. * * * It is not the passage of the federal act, but it is the taking effect thereof, which suspends the State statutes.

> The State courts may continue to conduct insolvency proceedings during the interval between the passage of the act and the time set for its effect. * * * Even during the operation of a federal act, a State Legislature may pass an insolvency act. Such an act, as to the subject matter, covered by the federal act, will remain ineffective until the repeal of the latter, but then comes into force."

In other words, the State insolvency laws, where they do not offend against some provision of the State or Federal Constitution, are "valid to all intents and purposes as part of the statutes of the State," while at the same time, during the period a federal act is in force, they are unenforceable, inoperative, confer no authority, grant no power, are silent and affect no one; they exist potentially but are of no force or effect whatever. So with the Eighteenth Amendment. Upon its ratification it was "valid to all intents and purposes as part of the Constitution," while at the same time, during the interval between ratification and January 16th, 1920, when as said in *Dillon* v. *Glos, supra,* the amendment, "by its own terms was to go into effect," the several state statutes regulating the manufacture and sale of intoxicating liquor were in full force and effect *as supreme law* within each particular state, and *the operation* of the Eighteenth Amendment *was suspended* until January 16th, 1920.

That an amendment may be ratified pursuant to the provisions of Article V of the Constitution, thereby becoming valid as part of the Constitution, and at the same time be inoperative, is further evidenced by the provisions of Section 3 of the Eighteenth Amendment, which reads:

> "This article shall be *inoperative* unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission hereof to the states by the Congress."

Article V of the Constitution fixes no limitation of time for ratification; it simply provides that an amendment when ratified by three-fourths of the States shall be valid as part of the Constitution. Hence, we take it, that if the Eighteenth Amendment had not been ratified within the seven year period of limitation, but had been ratified shortly thereafter, it would have nevertheless been valid under the provisions of Article V as a part of the Constitution, although of course an inoperative part of it. Congress apparently took for granted that the amendment, no matter when ratified, would become *valid as part* of the Constitution in accordance with the provisions of Article V upon ratification by three-fourths of the States, even though the amendment might expressly declare otherwise. Manifestly the word "inoperative" was used advisedly. The words "invalid," "void," "shall not be valid as a part of the Constitution unless, etc." would have run counter to Article V, since under that article the amendment would, no matter what words were used, be valid as part of the Constitution. But the word "inoperative," appearing in Section 3 of the Eighteenth Amendment, is not inconsistent with the words "valid as part of" appearing in Article V of the Constitution. As already pointed out, State insolvency laws are "valid as part of State statutes," although *inoperative* when touching the same subject matter as a federal bankruptcy law. So a State statute may become *a valid law* when passed and approved although inoperative until a future day when *it is to go into effect.*

Dunne v. *County of Rock Island*, 283 Ill. 628 (*supra*).

If the Eighteenth Amendment could *by its own terms* fix, in one section, a period of limitation, after which it would be *inoperative*, even though ratified subsequently to the period thus fixed, then no good reason appears,

why the amendment could not *by its own terms* also fix, in another section, a period of limitation within which, after ratification, it would be *inoperative.* And this we contend it did, fixing by virtue of section one (1) the period of one year within *which, after ratification, it* was to be *inoperative.*

Objections Answered (Cont'd).

(3) It will not do to say that the prohibition of the Eighteenth Amendment went into effect January 16th, 1920, but that the Eighteenth Amendment itself went into effect when ratified, on January 16th, 1919, or to put it another way, that the prohibitory portion of the Eighteenth Amendment went into effect January 16th, 1920, while the Eighteenth Amendment itself went into effect when ratified. This, for the reason, that the prohibition of the Eighteenth Amendment is not one thing and the Eighteenth Amendment another thing. The prohibition *is* the Eighteenth Amendment, and the Eighteenth Amendment *is* the prohibition. The Eighteenth Amendment has no existence, except as a prohibitory law. It is incorrect and misleading to speak of the "prohibitory portion" of the Eighteenth Amendment. The amendment is an indivisible unit and cannot be divided into parts or portions; as was said in *Board of Supervisors* v. *Keady*, 34 Ill. 293 (296):

> "The court is not aware of any rule by which an act of the Legislature, regulating the rights and duties of citizens, becomes a law, piece-meal * * *."

The purpose of the Eighteenth Amendment was to prohibit intoxicating liquors. If the amendment was ineffective for that purpose until January 16th, 1920, then, until that time arrived, it was ineffective for the entire object of the law.

See *People* v. *Rose*, 166 Ill. 422 (430).

Objections Answered (Cont'd).

(4) It will not do to say that the Eighteenth Amendment became effective as an *operative* part of the Constitution, when ratified by the Legislatures of three-fourth of the States, and that it merely fixed a time in the future for the inhibition of liquors, for if so, it became by virtue of Section 2, Article 6, of the Constitution of the United States the supreme law of the land. And necessarily, if so, it became the supreme law of the land the moment it was ratified. But by Article 10 of the amendments to the Constitution, the powers not delegated by the States were reserved to them. If, therefore, in the interim between the ratification of the Eighteenth Amendment, and the date when it went into effect, to-wit, January 16th, 1920, a State had passed a law or had adopted an amendment to its Constitution, self-executing in its provisions, regulating the manufacture and sale of intoxicating liquors, it would scarcely be contended that such law, or such amendment, would be in violation of the Eighteenth Amendment, as that amendment *by its terms* did not go into effect until January 16th, 1920. Such a law, or such an amendment, would not be in conflict with the Eighteenth Amendment, because no question of conflict could arise until there was a law *in force and effect* which would give occasion for the conflict. The situation thus described is also paralleled by the operation and effect of State insolvency laws in their relation to the National Bankruptcy Act. The law in reference thereto is stated in 14 R. C. L., p. 633, as follows:

> "The State courts may continue to conduct insolvency proceedings *during the interval between* the passage of the act and *the time set for its effect.*"

Such a law, or such an amendment, would, under the

provisions of Article 10 of the amendments to the Constitution of the United States, be the supreme law within the State which enacted or adopted it. If so, the Eighteenth Amendment would not be the supreme law of the land within that State; but this cannot be, for there cannot be two supreme laws. Therefore, we must conclude that in the interim existing between the ratification of the Eighteenth Amendment and the 16th of January, 1920, the Eighteenth Amendment was not the supreme law of the land, and, therefore, was not an *operative* part of the Constitution of the United States.

Objections Answered (Cont'd).

(5) It will not do to say that Section 2 of the Eighteenth Amendment conferred power on Congress to pass Title II of the National Prohibition Act in October, 1919.

Section 2 of the Eighteenth Amendment provides:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This section was ratified as an integral part of the Eighteenth Amendment. It was not ratified separately. It was an inseparable unit in an indivisible article. It added nothing to the power of Congress.

Its sole efficacy was to allow the several States the exercise of their original police power, not inconsistent with the first section of the Eighteenth Amendment.

See *U. S.* v. *Lanza*, 260 U. S. 377.

Whatever power Congress has to regulate the traffic in intoxicating liquors it received from the Eighteenth Amendment as a whole, and not from Section 2; as was said in *U. S.* v. *Cohen*, 268 Federal, 420 (Dist. Ct. E. D., Mo.), at page 425:

> "It may be considered that the provisions of the Volstead Act in so far as they provide for the exercise of police powers by the Congress, would have been unwarranted and unconstitutional before the adoption of the Eighteenth Amendment."

The second section of the Eighteenth Amendment, insofar as it relates to the power of Congress, merely confirmed the implied power which it received from Section 1, of the amendment.

See *Ex Parte Crookshank*, 269 Fed. 980, where, at page 986, the court said:

> "The truth is, in my judgment, that too much concern seems to have been manifested because of the incorporation of Section 2 into the Eighteenth Amendment. The power thereby sought to be conferred upon Congress would have been conferred by the adoption and ratification of Section 1 alone; a power being accorded to the Federal Government, Congress even in the absence of an express grant, would be authorized to legislate in the exertion of that power."

See, also, paragraph 18, section 8, of Article 1, of the Constitution of the United States. The court, in *Ex Parte Crookshank,* also quotes from Hamilton's 31st Number of the Federalist, as follows:

> "It may be affirmed with perfect confidence, that the continual operation of the intended Government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers."

In the *National Prohibition cases,* 253 U. S. 350, the court said:

> "I take it that if the second section of the article did not exist, no one would gainsay that the first section in and of itself, granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become fully operative."

It will be noted that when the Supreme Court, in *Dillon* v. *Glos,* 256 U. S. 368, 65 L. ed. 994, said that the Eighteenth Amendment, "by its own terms was to go into effct one year after being ratified," it spoke of the article as a whole; presumably, the court meant that Section 2 went into effect at the same time that Section 1 went into effect. This rule of construction is supported by the authorities.

In speaking of the constitutional provision to the effect that an act of the Legislature should not become a law until the expiration of sixty (60) days from the end of the session (such was the law in Illinois prior to 1870), the Supreme Court of Illinois, in *Wheeler* v. *Chubbuck,* 16 Ill. 361, held, that:

> "In order to take an act out of the constitutional provision the Legislature must direct that the act, as a whole and entirety, shall take effect at a different time; and that it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period."

The court, on that occasion, said, that

> "the direction must be made in a clear, distinct and unequivocal provision, and could not be helped out by any sort of intendment or implication."

In *Schneider* v. *Hussey,* 1 Pac. (Idaho) 343, at p. 344, it is said:

> "It will not be contended that one section of an act will take effect or be in force at an earlier date than other sections, unless the act itself shall so state."

To the same effect, see, also, *State* v. *Williams,* 90 N. E. (Ind.) 754; *State* v. *Paul,* 151 Pac. (Wash.) 114; *McArthur* v. *Franklin,* 16 Ohio State, 193, 203; *Leyner* v. *State,* 3 Ind. 490; *Grant* v. *Alpena,* 107 Mich. 335; *State* v. *Edwards,* 136 Mo. 360; *Ex Parte AhPah,* 34 Nev. 283.

Objections Answered (Cont'd).

(6) It will not do to say that the Eighteenth Amendment, by becoming effective January 16th, 1920, validated the act of Congress of October, 1919.

In *State ex rel Stevenson* v. *Tufley,* 22 Pac. (Nev.) 1054, it is said:

> "The act being void, no subsequent adoption of an amendment to a Constitution, * * * would have the effect to infuse life into a thing that never had any existence."

See, also, *Girdner* v. *Bryan,* 67 S. W. (Mo.) 699.

Ellis v. *City of Cleburne,* 35 S. W. (Tex.) 495, to the effect that no subsequent act can make an *ultra vires* act effective.

See, also, *DeWar* v. *People,* 40 Mich. 401.

Point I.

C.

Conclusions.

We conclude, therefore, that when Congress attempted to pass Title II of the National Prohibition Act, in October, 1919, it was endeavoring to make operative and effective an amendment which itself at that time, was inoperative and ineffective for any purpose, and vested in Congress no power until January 16th, 1920, to pass any laws pursuant to it.

We conclude also that Article V in no way conflicts with the construction, which we here contend should be given to the Eighteenth Amendment, viz: that upon ratification it became valid as a part of the Constitution, but did not then become an operative or effective law.

We believe that we have established, on reason and authority, that Title II of the National Prohibition Act is in conflict with Section 1, of Article I, of the Constitution of the United States, providing that "all legislative powers herein granted shall be vested in a Congress of the United States, etc.," in that, the power sought to be exercised in October, 1919, was not one of the powers granted to Congress at that time; and is also in conflict with Section 8, of said Article I, which enumerates the powers of Congress, in that, the power sought to be exercised by Congress in October, 1919, is not enumerated among the powers granted to Congress by Section 8 of said Article I, and was not granted by any of the amendments to the Constitution of the United States in force and effect at the time Congress sought to enact Title II of the National Prohibition Act. The conclusion follows, that Title II of the National Prohibition Act is unconstitutional and void.

Point II.

Section 24 of Title II is an Invasion of the Judicial Power.

The legislative intent in drafting Section 24 of Title II of the National Prohibition Act was to provide for an expeditious mode of trying the many cases, which Congress prophesied would arise in the enforcement of the act. Hence the provision for trial without a jury before a chancellor and all under the guise and label of "contempt."

With the federal jurisdiction created by the Eighteenth Amendment, the Districts Courts are burdened by Section 24, with what was, prior thereto, the business of state police courts. So far reaching is the newly created federal police jurisdiction, that nothing is left to the con-

trol of the courts. Not even are the district courts permitted to exercise plenary discretion in trying contemptuous violations of injunctional orders under the act.

Section 24 provides:

> "Any person found guilty of contempt under the provisions of this section shall be punished by a fine *of not less* than $500 *nor more than* $1,000 or by imprisonment of *not less* than thirty days *nor more* than twelve months or by both fine and imprisonment."

Thus, if the evidence in a proceeding under Section 24 discloses that the contemnor was guilty of a trivial violation of the injunctional order, the chancellor could do nothing but fine the contemnor not less than $500 or imprison him for not less than thirty days. And this, though the court thought that a fine of $25 or imprisonment for two days was ample punishment for the infraction of the injunctional order.

As ancient as the courts themselves, is the power to punish contemnors of the authority of the judiciary. A court without power to compel obedience to its orders would be a useless institution. As said by Mr. Justice Brewer, in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, at page 326:

> "The power to punish for contempt is inherent in all courts. * * * (327). The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded."

The law of the land is synonomous with the maintenance of the authority of the courts. Only by obedience to judicial mandate can personal and property rights be secure. Leave to personal choice obedience to judicial authority, and law and order would soon be chaos.

The very nature and purpose of a court, inherently

demands the power to punish for contempt. That power transcends legislative limitation and is not derived from any statute.

See *Ex Parte Terry*, 128 U. S. 289, 302.

The judicial power of the Federal Government is defined by Article III, Section 1 of the Constitution:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

And Article I, Section 8, par. 9 of the Constitution provides that Congress shall have power

> "To constitute Tribunals inferior to the Supreme Court."

Congress did exercise that power by the Act of 1831 creating the District Courts. In that act (now Section 268 of the Judicial Code) Congress defined the particular instances wherein the District Courts could exercise the power to punish for contempt; but did not in any wise interfere with the power of those courts fully to exercise that power in the particular instances listed in the act. In other words, the Act of 1831 is not a limitation upon the extent of the power to punish for contempt, but is a specification of the instances where the power may be exerted.

See *Interstate Com.* v. *Brinson*, 154 U. S. 447; *in Re Cuddy*, 131 U. S. 280; *Ex Parte Robinson*, 19 Wall. 504; *U. S.* v. *Toledo Newspaper Co.*, 220 Fed. 458 (affirmed in 237 Fed. 986, C. C. A. 6 Cir.); *in Re Judith Gap Commercial Co.*, 1 Fed. (2d Ser.) 508; *People* v. *Peters*, 305 Ill. 226.

The Supreme Court of California, in *Ex Parte Garner*, 177 Pac. p. 162, in sustaining the validity of a contempt statute, which authorized the imposition of a fine not ex-

ceeding five hundred ($500) dollars or imprisonment not exceeding five (5) days, or both, said, page 164:

> "The Legislature may not, whether by procedural rules, or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of the court to punish for contempt; yet it may provide rules of procedure and fix *the maximum* penalty which, if adequate for the purpose designed, must be deemed operative in controlling the action of the court."

Many of the states have set a maximum penalty for the punishment of contempts, and these have usually been held to be valid, on the ground, that the Legislature has thereby made effective the Constitutional inhibition against the imposition of excessive fines, and the infliction of cruel and unusual punishments. We have searched the statutes of many states, and have been unable to find any statute which fixes a minimum penalty as a punishment for contempt other than so-called liquor statutes, which have for the most part been modeled after the National Prohibition Act. The fixing of a minimum penalty, clearly invades the discretion of the court in carrying into effect its inherent power to punish for contempt. Many instances might be supposed where a nominal fine or a few days in jail would be adequate punishment for the contempt charged. It can well be conceived that the imposition of a minimum fine of five hundred ($500) dollars, under the provisions of Section 24 of the National Prohibition Act, would, in many instances, be a violation of the constitutional provision, forbidding the imposition of excessive fines.

Point III.

Section 24 of Title II of the Prohibition Act Violates the Sixth Amendment to the Constitution.

The Sixth Amendment provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *; to be confronted with witnesses against them * * *."

As demonstrated in the preceding section of this argument, the minimum and maximum penalties of Section 24 do not comport with the plenary power of courts of equity to punish contemnors. If the section is to stand at all, it must stand as a definition of newly created crime to be tried without a jury.

A crime is defined to be "a wrong directly or indirectly affecting the public, to which *the State* has annexed certain punishments and penalties" (16 C. J. 951). What is Section 24 but an attempted definition of a wrong affecting the public to which the government has annexed punishments and penalties? It, therefore, seeks to define a crime of a distinct and separate class from contempt proper.

The section creates a new statutory crime; either that, or it is a manifest invasion of the judicial power. As a newly created statutory crime, it should be properly labeled, e. g., "Obstruction of Justice by Contempt," in analogy to such offenses as were unknown to the common law, but which have since been created and specially designated, e. g., "Larceny by Bailee," "Embezzlement by Agent," etc.

In *Ex Parte, in the Matter of Philip Grossman*, Petitioner, No. 24, Original, October Term 1924, it was de-

cided by this court that contempt of court was an offense against the United States within the pardoning power of the President. Nowhere in the opinion of the court is Section 24 of Title II of the National Prohibition Act referred to. This court, in the *Grossman case,* seems to have treated only of that class of contempts which was known to the common law. It does not seem to have been pointed out to the Court, in that case, that the criminal contempts provided for in Section 24 were, as shown hereafter, unknown to the common law, and to the framers of the Constitution. The conclusion, that common law contempts only were under consideration by the court, we deduce from the use by the court of the words, "common law contempts" and from the reasoning of the court to the effect that "offenses against the United States" included "common law offenses in the nature of contempts against the dignity and authority of United States Courts" and that since the king of England, prior to the Revolution, had power to pardon contempts of court, the framers of our Constitution with the background of the common law and English history in mind, intended, in drafting the Constitution, to include offenses in the nature of contempts, within the scope of the pardoning power of the President. As a predicate for the argument, which we make following, we desire to call the court's attention to two statements from the Grossman opinion—first, "For civil contempts, the punishment is remedial and for the benefit of complainant and a pardon cannot stop it;" second, "while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis,* and not criminal prosecutions, within the Sixth Amendment or common understanding." When this court speaks of contempts as being of-

fenses *sui generis*, we take it that the court has reference to what we might term contempts "proper," and that merely because a statute declares some act of omission or commission to be a contempt, it would not thereby necessarily be a contempt and an offense *sui generis*. We take it, that, if Congress were to authorize a court of equity, to enjoin citizens from violating the whole category of crimes, and were to enact a statute making the violation of such injunction punishable as a contempt, that the court would not sustain any such violations as contempts and as offenses *sui generis*. Having laid this foundation, we now proceed to the argument that Section 24 of Title II, violates the Sixth Amendment to the Constitution.

A contempt proceeding, under Section 24, can be brought only as a result of the violation of an injunction which has issued under Section 22, which provides for the issuing of an injunction to suppress nuisances. But a bill for injunction, under Section 22, is a civil proceeding. Such bill may be brought in the name of the United States by the Attorney General of the United States, or by any United States attorney, or by any prosecuting attorney of any state, or by the commissioner or his deputies or assistants. The United States does not appear in its sovereign capacity, complaining of the violation of its criminal law, but comes into court only as a suitor seeking a remedy. It may be said, without fear of contradiction and without the citation of any authorities, that all actions to enjoin are civil actions.

A proceeding brought for the violation of an injunction is likewise a civil proceeding in most instances.

See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (injunction to restrain boycotting); *O'Brien* v. *People*, 216 Ill. 354 (injunction to restrain injuring complain-

ant's business); *People* v. *Peters*, 305 Ill. 226 (contempt for violating a final order in quo warranto proceedings).

A case directly in point is *People* v. *Buconich*, 277 Ill. 290. This was a proceeding in contempt for the violation of an injunction issued upon a bill to enjoin the keeping of a house of ill fame *as being a nuisance*. The suit was brought *in the name of* the People of the State of Illinois. The court said, page 294:

> "The bill for an injunction is a civil suit. It does not seek to enforce any criminal liability or impose any punishment. Its sole object is to restrain the maintenance of a nuisance. The remedy is purely civil, and the proceeding to punish for contempt in violating the injunction is also civil."

To the same effect see:

State v. *Murphy*, 41 Atl. (Vt.) 1037.

If contempt of court, as provided for in Section 24 of Title II, is something different from a common law contempt, then it follows that the reasoning of this court in the *Grossman case*, No. 24 Original, does not apply to contempts provided for in Section 24, as the framers of the Constitution had in mind to include within the pardoning power of the executive, and to exclude from the Sixth Amendment, only such contempts as were known to the common law, in other words, common law contempts; any change in the nature of contempts, as they were known to the common law, at and prior to the adoption of the Constitution, or any enlargement thereof, could not be said to be in the minds of the framers of the Constitution. Hence, if the contempt provided for in Section 24, is not a common law contempt, then it is not included within the scope of the pardoning power. It can be brought within the scope of the pardoning power, only by treating it as a distinct crime, created by Sec-

tion 24, and the proceeding to punish it under Section 24, as a criminal prosecution.

If the contempt provided for in Section 24, is not a common law contempt, and if the proceedings to punish it are "criminal prosecutions," within the meaning of the Sixth Amendment, then certainly Section 24 is unconstitutional, because it provides that the court "may summarily try and punish the defendant."

Is the contempt provided for in Section 24, a common law contempt, and are the proceedings provided for in Section 24 to punish the violation of an injunction, "criminal prosecutions"?

The contempt, so provided for, is not a common law contempt, for the following reasons:

1st. Without Section 24, the court would have the undoubted right to punish a violation of an injunction, issued under Section 22, under the provisions of Section 268 of the Judicial Code, or it would have such right under the common law, pursuant to its inherent power to punish for contempts. But we have demonstrated that such a proceeding would be a civil one, and the contempt involved would be civil, and not criminal. And for civil contempts a fine only could be imposed.

See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418.

This was likewise the rule at common law.

Moreover, "For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it."

See *Ex Parte, in the Matter of Philip Grossman,* Petitioner, No. 24, Original.—October Term, 1924.

2nd. At common law the defendant in a criminal contempt proceeding had the right to purge himself of the

alleged contempt by filing a sworn denial. In 13 C. J. p. 74, Section 109, it is said:

> "At common law the sworn answer of the accused validly denying the alleged contempt was absolutely conclusive and entitled defendant to be discharged."

See, also, *People* v. *Gilbert*, 281 Ill., p. 619; *People* v. *McDonald*, 314 Ill. 448; *Kirk* v. *U. S.*, 112 C. C. A. 531. But this is not so under Section 24, for as is therein recited, "the trial may be had upon affidavits *or either party* may demand the production and oral examination of the witness."

The proceedings under Section 24 to punish the violation of an injunction issued under Section 22, are criminal prosecutions for the following reasons:

1st. Nowhere in Section 24 is it provided specifically, that the violation of an injunction is or shall be a contempt of court. It provides that "In the case of the violation of any injunction * * * the court * * * may summarily try and punish the defendant." For what? Presumably for the offense of violating an injunction. The offense is tried as a distinct crime. No statute was needed to confer jurisdiction on a court to try an injunction violator for contempt. "The defendant is to be punished" not the *respondent*, and the defendant is to be punished, as later appears in the section, by imprisonment, if the court so wills. The language imports a criminal prosecution. But the section takes it for granted that the trial shall be for contempt, without specifically so providing. The language is this, "The proceedings for contempt shall be commenced by filing, etc."

2nd. The language of Section 24 measures up to the definition of a crime. See 16 C. J. 951 (quoted *supra*). The Government by statute fixes the penalties—a mini-

mum and a maximum—and not the court. The discretion of the court is confined within limits, just as in criminal statutes.

3rd. The violation of an injunction ceases to be what it was at Common Law, and what it was, at and prior to the adoption of the Constitution, viz: a civil wrong or tort, to-wit: a civil contempt, but becomes instead something criminal. That something is a criminal offense, and not a criminal contempt, even though the statute may call it such; it could only be a criminal contempt, if it were directed against the power, dignity or authority of the court; its nature cannot be changed by calling it what it is not. Like the violation of an injunctional order abating a house of ill-fame as a nuisance, its nature is civil. See *People* v. *Buconich,* 277 Ill. 290. The primary purpose of the proceeding, is to enforce the civil remedy of the United States, the complainant in the equity suit, against a defendant, who is the other party to the equity suit. Such proceedings are not brought to vindicate public authority, since, for that purpose, the United States Government has an adequate remedy by enforcing its criminal statutes.

That the contempt is civil in its nature, is recognized by public officials charged with its prosecution. The uniform practice in such proceedings, as it was in this case (Rec., ...), is to institute, entitle and try such proceedings as part of the main cause in equity. This is an important test in determining whether a proceeding be civil or criminal.

Gompers v. *Bucks Stove & Range Co.,* 221 U. S. 418.

4th. At common law, at and prior to the adoption of the American Constitution, the maintenance of a public nuisance was a crime, punishable and abatable in the courts of criminal jurisdiction only. Hence, the effect of

making such an offense punishable and abatable in a court of chancery, is to deprive a defendant of his constitutional right, to have an indictment preferred against him, and a trial by jury. In *Hedden* v. *Hand*, 107 Atl. (N. J.) 285 (holding a statute unconstitutional, similar to the one here in question), the court said:

> "It is idle to entertain the thought for a single moment that the Legislature can change the nature of an offense by changing the forum in which it is to be tried."

To the same effect see *U. S.* v. *Lot* 29, *Blk.* 29, *Highland Park*, 296 Fed. 729 (holding Sec. 22 unconstitutional and inferentially Sec. 24 also).

5th. Section 24 provides that upon an information filed the court "shall forthwith cause a *warrant* to issue, under which the *defendant* shall be *arrested.*" Here we have the application of a strictly criminal proceeding, viz: "Warrant" and "arrest," not rule to show cause, citation or attachment.

We conclude, therefore, that since the offense mentioned in Section 24, is not a common law contempt, and since it is civil in its nature (—that is, if such offense is treated as a contempt), then it is not within the pardoning power; and if it is not within the pardoning power it is not "an offense against the United States"; yet the United States has imposed criminal penalties; we have also shown that the proceedings under Section 24, to punish the offense of violating an injunction are criminal prosecutions; therefore, the offense mentioned must be a statutory crime.

Point IV.

The Injunctional Order upon which the judgment is founded is absolutely void as District Courts are without power and are expressly prohibited by Equity Rule 73 from granting temporary injunctions without notice.

By Sections 913 and 917 of the Revised Statutes, the Equity Rules are given the same force and effect as Acts of Congress. These rules constitute a part of the Judicial Code. Rule 73 provides:

> "No preliminary injunction shall be granted without notice to the opposite party."

This rule goes to the source of the power of the District Court to enter the injunctional order. Its effect is to prohibit the exercise of the injunctive power without complying with its terms. Unless notice of the application for an injunction be given to the defendant, the District Court is shorn of power to act. Thus the rule goes to the jurisdiction of the court to enter an injunctional order.

It calls for no extended argument to show that an injunction granted by a court without power or jurisdiction to enter it is absolutely void and cannot be the basis of a valid contempt proceeding. A void injunction cannot serve as the basis of a valid judgment finding a party guilty of contempt for violating it.

Drew v. *Hogan*, 26 App. Cas. D. C. 55, 61.

Cathey v. *Norfolk & W. Ry. Co.*, 228 Fed. 26 (C. C. A. 4th Cir.).

Bank of United States v. *White*, 8 Peters 262, 269.

Northwestern Mut. Life Ins. Co. v. *Keith*, 77 Fed. 374.

United States v. *Barber Lumber Co.*, 169 Fed. 184.

The court will note that a temporary restraining *order* was *not* issued in this case. The order here is that of a temporary *injunction* and is in fact so entitled. The language of the order is:

> "It is ordered that pending the final hearing and determination, and until the conclusion of the trial of said bill for injunction against said nuisance, etc."

The record does not disclose, and the government did not attempt to prove that the petitioners were notified of the application upon which the injunctional order was based.

Section 22 of Title II of the Prohibition Act provides:

> "An action to enjoin any nuisance defined in this title may be brought in the name of the United States * * * *Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases.* If it is made to appear that such nuisance exists, *a temporary writ of injunction shall forthwith issue.*"

So the recital is that the proceeding under Section 22 "shall be brought and tried as an action in equity." As an "action in equity" the Equity Rules control the procedure; and Rule 73 is positive in its command that:

> *"No preliminary injunction shall be granted without notice to the opposite party."*

Not a word appears in Section 22 from which even an inference can be drawn, that it is not necessary to notify a defendant of the application for injunction. Even though there were such inference, it would have to yield to the positive declaration of the section, that "such action shall be brought and tried as an action in equity."

Clearly Section 22 provides for a temporary injunction in the usual form of equity procedure—that and nothing more. The settled course of equity procedure in the Federal courts gave to the petitioners the substantive right

of notice of the application for the temporary injunction. No such notice was given them prior to the entry of the injunctional order.

It follows, that the injunction herein, was entered in violation of Equity Rule 73, by a court expressly prohibited by the said rule and its statutory reaffirmation, from entering it without notice to the petitioners. Thus the entire contempt proceeding was void *ab initio.*

Point V.

The specific restraints of the Injunctional Order must be considered as though incorporated into the language of Section 24 of Title II. So construed that section would not contain the word "removed". As the information for contempt is the jurisdictional pleading, and as the information related solely to acts of removal, it is apparent from the face of the record that the court was without jurisdiction.

Section 24 of Title II is specific in its definition of the moving information as the jurisdictional pleading. Part and parcel of the information, indeed the essence of its vitality is the injunctional order which it charges to have been contemptuously violated. And the information sets forth the substance of the injunctional order, viz:

> " * * * be restrained and enjoined from keeping, using, maintaining, dealcoholizing, or otherwise permitting and aiding, abetting or assisting the keeping, using or maintaining of said premises as a place where intoxicating liquor was manufactured, sold, kept, bartered, dealcoholized or otherwise disposed of."

Thus not a word appears as to "removal".

The information sets forth three alleged overt acts of contempt and each relates to a "removal".

This is not a case involving a defective statement of

an offense within the jurisdiction of the court. Here the information wholly fails to state an offense of any kind. And the jurisdiction of the court is dependent upon the injunctional order; for under Section 24 of Title II the particular elements restrained in an injunction under Section 22 should be considered as written into the former section. In other words, the injunctional order, in the instant case imposes the following restraints:

> "* * * No liquor shall be manufactured, sold, kept, bartered, dealcoholized or otherwise disposed of."

These quoted restraints must be construed, in this case, as though they were contained in the body of Section 24. To illustrate, take the last sentence of Section 24:

> "Any person found guilty of contempt (in violating an injunctional order providing that no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of) under this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment."

The section as so reading does not inhibit "removing". Wherefore, "removals" are not within the jurisdiction of the court as invoked in a proceeding thereunder which basically—that is by the injunctional order—does not restrain or inhibit a "removal".

In *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, the court ruled that proceedings for criminal contempts are criminal cases and that

> "it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself."

The information for criminal contempt is governed by the same rules of criminal pleading as apply to criminal

cases (*Gompers* v. *Bucks Stove & Range Co., supra; Galligan* v. *U. S.*, 282 Fed. 606; *Crites* v. *State,* 105 N. W. (Neb.) 469, 471.) At this late date it must be admitted that no intendments or presumptions of the trial court can be invoked to bolster up a judgment for criminal contempt. The proceeding is criminal in its nature and the rules governing criminal proceedings control.

Section 24 of Title II in defining the jurisdiction of the District Court, says:

> "The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the *alleged facts constituting the violation* whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested."

The only *"facts constituting the violation" in the instant case are the first three described overt acts of the information for contempt*—acts of "removal".

True each of the three paragraphs of the complaint which set forth the overt acts contains a recital.

> "and did then and there manufacture, sell, keep, barter, dealcoholize and otherwise dispose of said beverage."

But a reference to each of said paragraphs shows that the omnibus recital is a mere conclusion of the pleader having no relation to the detailed description of each of the three overt acts of removal.

The "acts of removal" are not forbidden in terms by the injunctional order; hence they were not forbidden at all, unless it can be said, that they are included by reasonable construction in the words "or otherwise dispose of." Five substantial reasons present themselves to establish that they are not so included as follows:

First: By no rule of construction can the word "re-

moved" be said to be synonymous with the words "dispose of." One may remove without disposing of, and conversely, one may dispose of without removing. The words "dispose of" always connote the idea of the transfer of either title or possession by means of gift, sale, exchange, etc. While the word "remove" standing alone involves no idea or notion of transfer. It is said, in 18 C. J. 1281:

> "Even standing alone, the phrase 'dispose of', when used in a criminal statute, is universally held by the courts to include *only* those transactions in which there has been a transfer of either title or absolute possession of the property, or else some disposition of it as would destroy it in whole or in part."

The information for contempt in the instant case did not allege that the barrels of beer were removed by the defendants with the intent of selling or bartering the same and without such allegation, the word "removed" could not be held to be included in the phrase "dispose of." When a person removes goods with the purpose and intent of selling, bartering, exchanging, or in some other way transferring title and possession, the removal may be so closely attached to the disposal as to be an integral part of it, but as said before, there is no such allegation in the information herein filed.

In *Malone* v. *Commonwealth*, 135 S. W. (Ky.) 235, a removal of goods was held to be included in the phrase "dispose of", where such removal was *with intent to sell;* to the same effect also is *State* v. *Gorman*, 216 Pac. (Kan.) 290; but, in *Scott* v. *State*, 64 S. E. (Ga. A) 1005, *a mere removal* was held not to be included within the term "dispose of."

Second: Upon this record the word "removed" is conclusively excluded from the significance of "or otherwise dispose of." The very allegation of each of the

three acts of removal as contained in the information shows that "or otherwise dispose of" means something altogether different from *and additional* to "removal." Thus each of the three paragraphs of the information wherein the specific overt contemptuous acts of "removal" are pleaded concludes generally:

> "And did then and there manufacture, sell, keep, barter, dealcoholize, *and otherwise dispose of* said beverage and did then and there neglect and fail to prevent the *removal* and transportation of said beverage out of and from the said premises."

Third: The word "removal" can not be drawn within the significance of "or otherwise dispose of" because of the elementary rule of *ejusdem generis*. "Or OTHERWISE dispose of," if it means anything must mean an act of character and quality like that of (a) manufacture, (b) sell, (c) keep, (d) barter and (e) dealcoholize. Removal is not such an act.

Fourth: To accord the word "removal", a significance embraced within that of "or otherwise dispose of" would be to vitiate an essential element of restraint in the injunctional order, viz: "keep." As the order recites on its face an inhibition against *keeping*, it would be idle folly to include an inhibition against "removing," for one would destroy the other. Since the injunctional order in terms forbade "keeping" all intendments should be against the inclusion of an act of removal as within the meaning of the words "or otherwise dispose of." The word "remove" is, if anything, the antonym of the word "keep". If the defendants were forbidden to keep, then they were required to move. In this connection let it be noted that it appears from the bill of complaint and particularly the affidavits annexed thereto, that there were on the premises of the defendants, at the time the injunction issued, a quantity of beer in excess of two thousand barrels. The injunctional order forbade

the defendants from keeping it. The information for contempt charged them with the removal of eight hundred barrels of beer.

Fifth: The recital "or otherwise dispose of" is a vague attempt at an omnibus entrapment of a defendant. Fundamentally, as we have already demonstrated, an information for criminal contempt is governed by the rules of criminal pleading. It calls for no argument to prove that an indictment charging the defendant with "otherwise disposing of" property would be a nullity. The specification of the charge must be such that the defendant after paying his debt to the state or to the nation may rely on the accusatory pleading as a receipt, if you please, or as a bar to another prosecution for the same offense. How could any person base a plea of former jeopardy to an indictment for "otherwise disposing of"? Clearly the sixth element of restraint—"or otherwise disposing of"—is too vague and indefinite to include acts of removal or in fact any acts not specifically forbidden.

The first essential of a statute creating a crime is certainty of description of the particular elements of the inhibited act. *Ibi Jus Incertum, Ibi Jus Nullum.* And the degree of certainty, must necessarily be greater than in statutes relating to civil matters; for punitive statutes must be strictly construed and all doubts arising in the process of construction must be resolved in favor of the accused.

A good illustration of a criminal statute held void for uncertainty is presented in *International Harvester Company* v. *Kentucky,* 234 U. S. 216, where the court in declaring a Kentucky punitive antimonopoly statute void for want of certainty, says:

> " * * * if business is to go on, men must unite to do it, and must sell their wares. To compel them to guess on peril of indictment, what the community

would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

The jurisdiction of the District Court to proceed under Section 24 was dependent upon the injunctional order and the information for contempt. That jurisdiction was invoked by the government to punish acts of removal in violation of the injunctional order. Section 24, as applied to the instant case, incorporated the restraints of the injunctional order, and the injunctional order does not restrain removal. Therefore, there was nothing before the court and the court had no jurisdiction to enforce the penalty of Section 24.

Point VI.

The common law record in the contempt case shows upon its face that punishment was imposed upon petitioner for three acts of removal not contained or inhibited in the injunctional order. As the judgment is general and contains no findings, there is no way to apportion the sentence as to these three acts, nor to detach the penalty therefor, from that imposed upon petitioner for the six acts restrained by the injunctional order. Wherefore the judgment, sentence and fine are nullities.

The judgment contains no finding as to which of the six acts restrained is the subject of punishment; nor is there any finding as to the extent of punishment for the additional three acts of removal set forth in the information for contempt and not embraced by the terms of the injunctional order. It must, therefore, be conclusively

presumed that the court in fixing the sentence and penalty lumped it for all of the nine acts.

In *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, the court clearly announces the rule to be applied to this sort of situation:

> "The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts, he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that, having found them guilty of these nine specific acts, he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants had been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction."

The judgment here is a unit. By the judgment the petitioner was found guilty of all of the following acts:

1. Manufacturing.
2. Selling.
3. Keeping.
4. Bartering.
5. Dealcoholizing.
6. Otherwise disposing of.
7. Act of removal on May 31, 1924.
8. Act of removal on June 2, 1924.
9. Act of removal on June 3, 1924.

Under the *Gompers* case it must be presumed that the general sentence is an aggregate of separate sentences for each of the nine acts listed above.

In the *People* v. *Newmark*, 312 Ill. 625, the court reversed a judgment for criminal contempt where

the petitioner had refused, because of the constitutional privilege, to answer a series of 62 questions propounded to him by the grand jury which was investigating bribery of jurors in the trial of Governor Small. Some of the questions involved answers that would not expose the defendants to danger; but the court considered the judgment of conviction as a unit and refused to apportion or to unscramble the harmful questions from the harmless. To the same effect, see *People* v. *Boyle,* 312 Ill. 586; *Oates* v. *U. S.,* 223 Fed. (C. C. A. 4th Cir.) 1013.

The three acts of removal set forth in the injunction for contempt were wholly foreign to the restraints and inhibitions of the injunctional order. As demonstrated under Point V, the restraints and inhibitions of the injunctional order became, as to this case, part and parcel of the language of Section 24 of Title II of the National Prohibition Act. Thus the three acts of removal, which presumptively were included in the aggregate sentence, were wholly beyond the jurisdiction of the court and could not serve as the basis for punishment.

Point VII.

The judgment of the court finding the defendants guilty of "otherwise disposing of," and the general sentence which impliedly includes a penalty for "otherwise disposing of" are void.

The judgment order of the court found the defendants "guilty of contempt of court of violating the temporary injunction *as charged in said information.*" (Rec., ...) The information charged the defendants with three specific overt acts of removal, and *in addition* thereto, charged that they "did then and there manufacture, sell, keep, barter, dealcoholize, *and otherwise dispose of* said beverage." (Rec., ...) The judgment order of the

court further recites, "It is therefore considered by the court and is the sentence and judgment of the court *upon the finding aforesaid,* that the defendants * * * be confined * * * and forfeit and pay, etc." (Rec., ...)

Thus, it appears, that the court found the defendants guilty of three specific acts of removal and *in addition* thereto, of six other and different acts, one of which was "otherwise disposing of." A general aggregate sentence was imposed for all of the acts of which defendants were found guilty, including "otherwise disposing of."

Under the title "Judgment or Order—Requisites and Validity" it is said in 13 Corpus Juris, page 81, par. 121:

> "It has often been held that, if the facts constituting the contempt are sufficiently set forth in the moving papers filed, the judgment is sufficient if it expresses on its face its general objects together with apt reference to the moving papers."

The judgment order in the instant case made reference to the moving papers, viz: finding the defendants guilty *"as charged in said information."* One of the charges in the information was that the defendants "did then and there * * * otherwise dispose of." In so far as this charge at least is concerned, no facts "constituting the contempt are sufficiently set forth in the moving papers filed"; in truth no facts whatever are set forth. We have already shown under Point V of this argument that the charge "otherwise dispose of" is vague, indefinite, uncertain and wholly insufficient to state an offense or support a judgment. We conclude therefore that the judgment in the instant case, or at least so much of it, as by reference finds the defendants guilty "of otherwise disposing of," is void. Had the sentence imposed been several or definitely apportioned to the several alleged contemptuous acts embraced in the finding of the court, it might be said that the remedy lay in modifying or correcting the judgment or declaring such portion of the

No. 415.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

TERRENCE DRUGGAN, APPELLANT,

vs.

PALMER E. ANDERSON, UNITED STATES MARSHAL, ETC., AND WESLEY WESTBROOK, SUPERINTENDENT OF THE COOK COUNTY JAIL OF COOK COUNTY, ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF AND ARGUMENT FOR APPELLANT.

THOMAS D. NASH,
MICHAEL J. AHERN,
Counsel for Appellant.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

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No. 415.

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VS.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

The appellant, Terrence Druggan, is in the custody of the respondents, Palmer E. Anderson, United States marshal for the Northern District of Illinois, and Wesley H. Westbrook, superintendent of the Cook County jail of Cook County, Illinois, at the said county jail, by virtue of a mittimus (Rec., 5) executed by delivering the body of the appellant to the said jailer on November 11, A. D. 1924. (Rec., 6.) This mittimus issued pursuant to a judgment and order of the District Court of the United States for the Northern District of Illinois, finding the appellant guilty of contempt of court and sentencing him to imprisonment for one year in said Cook County jail,

and imposing upon him a fine of one thousand ($1,000) dollars and costs. (Rec., 25.)

The contempt proceedings, resulting in appellant's convicition, were instituted under the provisions of Sec. 24* of Title II of the National Prohibition Act (Rec.23) for the violation of a temporary injunction (Rec., 14) issued pursuant to the authority granted by Sec. 22 of Title II of said Act. (Rec., 6.)

On March 19, 1925, appellant filed in the District Court for the Northern District of Illinois, his petition for a writ of habeas corpus to secure his release from custody, alleging therein the unconstitutionality of Title II of the National Prohibition Act, upon grounds not heretofore urged or passed upon by this Honorable Court, or any of the District Courts of the United States, the unconstitutionality of Sec. 24 of said Title II, and the invalidity on jurisdictional grounds of the injunctional order which appellant was charged with violating. (Rec., 1.)

To this petition the respondents filed a demurrer. (Rec., 26.) After hearing arguments the District Court sustained the demurrer, dismissed appellant's petition and allowed an appeal direct to this Honorable Court. The opinion of the District Court is not reported. Appellant perfected his appeal and this Honorable Court, on motion of the appellant, has advanced the cause for hearing to October 5, A. D. 1925.

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*Sec. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

Specification of Errors.

1. The District Court for the Northern District of Illinois erred in dismissing the petition for habeas corpus.

2. Said District Court erred in not holding that the appellant is wrongfully held and illegally imprisoned.

3. Said District Court erred in not holding that appellant is held and imprisoned without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

4. Said District Court erred in holding that the National Prohibition Act, excepting only Sections 1, 27, 37 and 38 of Title II thereof, upon which said Act, said judgment and conviction are based, is a valid and constitutional law; for the said Act is unconstitutional for the following reasons:

A. That Section 1 of the Eighteenth Amendment to the Constitution of the United States provides:

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

B. That the Eighteenth Amendment was proposed to the Legislatures of the several states by the Sixty-fifth Congress, on the 19th day of December, 1917, and was, on the 16th day of January, 1919, ratified by the legislatures of three-fourths of the whole number of states in the United States and certified by the acting Secretary of State as valid to all intents and purposes as a part of the Constitution of the United States;

C. That the Supreme Court of the United States, in *Dillon* v. *Glos*, 256 U. S. 368, declared that the Eighteenth

Amendment to the Constitution of the United States went into effect on January 16, 1920;

D. That under Section 1 of the Eighteenth Amendment prohibition did not become effective and operative until one year from the date of its adoption by three-fourths of the whole number of states, that is to say, it became effective and operative on January 16, 1920;

E. That Congress was without constitutional power to legislate upon the subject of prohibition of intoxicating liquors until the Eighteenth Amendment became operative on January 16, 1920;

F. That the National Prohibition Act was passed over the president's veto on October 28, 1919, nearly three months before said amendment became operative;

G. That Title II of the National Prohibition Act having been passed prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void;

H. That there is no provision in the Eighteenth Amendment giving to Congress power to legislate with reference to the subject-matter of said amendment prior to its effective date.

5. Said District Court erred in holding as valid and constitutional, Section 24 of Title II of the National Prohibition Act—the contempt section upon which the judgment complained of is founded. The court erred in so holding, for the following reasons:

A. That said Section 24 of Title II fixes an arbitrary maximum and minimum penalty, regardless of the degree of fault of the contemnor and is for that reason an unconstitutional interference with and invasion of the judicial power.

B. That the discretion of the chancellor in assessing penalties upon contemnors is destroyed by this section;

C. That the District Courts from their creation by the Act of 1831 came into existence clad with plenary power to vindicate their authority and to punish contemnors.

D. That said Section 24 invades, supersedes, limits and restricts the inherent plenary power of the District Courts to assess the penalty for contempts of their authority and is, therefore, an unconstitutional interference with and invasion of the judicial power.

E. That said Section 24 in its definition of an arbitrary maximum and minimum punishment without regard to the extent of the contemnor's fault is the creation of a new statutory crime to be tried by a court of equity without a jury and upon affidavits without confrontation of witnesses in violation of the Sixth Amendment to the Constitution of the United States.

6. Said District Court erred in not holding that the injunctional order, upon which the contempt proceedings were based, was obtained and granted without notice first given to appellant, and for that reason was illegal and void. The court erred in this for the following reasons:

A. That Equity Rule 73 provides that

> "No preliminary injunction shall be granted without notice to the opposite party."

B. That under Sections 913 and 917 of the Revised Statutes the Equity Rules are given the same force and effect as Acts of Congress.

C. That Section 22 of Title II of the National Prohibition Act, under which the bill for injunction aforesaid was instituted, provides that

> "Such action shall be brought and tried as an action in equity," etc.

D. That Equity Rule 73 applies to bills brought under Section 22 of Title II of the National Prohibition Act.

E. That the non-compliance with Equity Rule 73 went directly to the jurisdiction of the court to grant the temporary injunction aforesaid.

F. That the injunctional order so violating Equity Rule 73 is void and all of the contempt proceedings thereon and the judgment, sentence and fine therein are likewise null and void and of no legal effect whatever.

BRIEF.

Point I.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war powers of Congress.

A. The Eighteenth Amendment to the Constitution of the United States did not go into effect or become operative as a part of the Constitution until January 16th, A. D. 1920.

Dillon v. *Glos*, 256 U. S. 368.

Sec. 3, Title II, National Prohibition Act.

National Prohibition Cases, 253 U. S. 350.

Street v. *Lincoln Safe Deposit Co.*, 254 U. S. 88.

Cases cited and quoted from under Point I of Argument (*Infra*, p. . . .)

B. The Government of the United States is a Government of limited and defined powers. Congress has power to legislate only where it has constitutional authority to do so.

12 C. J., p. 742, Sec. 156, and U. S. Sup. Ct. cases there cited.

Conclusion: Title II of the National Prohibition Act having been passed October 27, 1919, prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void.

Point II.

Section 24 of Title II is an invasion of the judicial power and therefore unconstitutional.

A. The power to punish for contempt is inherent in courts.

Bessette v. *Conkey Co.*, 194 U. S. 324, 326.
Ex parte Terry, 128 U. S. 289, 302.

B. Section 24 of Title II limits the discretion of the court in the fixing of penalties and thereby invades the inherent power of the court.

Ex parte Garner, 179 Cal. 409.
See Point II of Argument (*Infra*, p. 38.)

Point III.

Section 24 of Title II of the National Prohibition Act violates the Sixth Amendment to the Constitution.

See Argument under this point (*Infra*, p. 42.).

Point IV.

The Injunctional Order upon which the judgment is founded is absolutely void as District Courts are without power and are expressly prohibited by Equity Rule 73 from granting temporary injunctions without notice.

See Argument under this point (*Infra*, p. 49.).

ARGUMENT.

Point I.

A.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war time powers of Congress.

Leaving out of consideration of this brief, Sections 1, 27, 37 and 38 of Title II aforesaid, for they in nowise affect the rights of the appellant herein, the contention of the appellant that Title II of the National Prohibition Act is unconstitutional and void, may be reduced to the following syllogistic form:

A. The Eighteenth Amendment to the Constitution of the United States went into effect and became operative as a part of the Constitution of the United States on January 16, A. D. 1920.

Dillon v. *Glos*, 256 U. S. 368, 65 Law Ed. 994.

B. The Government of the United States is a Government of limited and defined powers. All national authority is derived from the Constitution of the United States, in which the powers of the Federal Government are enumerated.

12 C. J. p. 742, Sec. 156, and U. S. Sup. Ct. cases there cited.

Conclusion—Title II of the National Prohibition Act, having been passed October 27, 1919, prior to the time

when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void.

The point here involved is not that a Legislative body may not pass a law *in praesenti* to become effective *in futuro*. The law is well settled that a Legislative body having power to legislate over a particular subject-matter may pass laws to become operative at a future date or on the happening of a future event; neither are anticipatory State statutes forbidden, unless there is, by the terms of the Constitution, a limitation on the Legislature to pass them. The objection here made, is, not that Congress passed the Volstead Act to go into effect *in futuro*, but that it passed it at all, at the time when it did pass it; that it had no power whatever, under the Federal Constitution, to pass any legislation with respect to the Eighteenth Amendment, until that amendment became effective and operative, as a part of the Constitution of the United States.

It is not here contended that the Eighteenth Amendment is unconstitutional; neither is it contended that Congress did not derive the power, impliedly, from Section I of the Eighteenth Amendment and, expressly, from Section II of the Eighteenth Amendment to enact legislation to make the amendment effective. It is conceded that Congress derived such power from the Eighteenth Amendment, but it is contended that at the time the National Prohibition Act was passed, such power was merely inchoate and *not vested* until January 16, 1920.

In *Dillon* v. *Glos*, 256 U. S. 368, the court said:

> "The provisions of the Act, which the petitioner was charged with violating, and under which he was arrested (Title II, Secs. 3, 26), were by the terms of

> the Act (Title III, Sec. 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter *by its own terms* was to *go into effect* one year *after* being ratified. *Its ratification,* of which we take judicial notice, was consummated January 16, 1919." (Italics ours.)

That Congress regarded the Eighteenth Amendment as inoperative and ineffective until one year after its ratification, is clear from the language of Section 3 of Title II of the National Prohibition Act, which reads:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States *goes into effect,* etc., etc."

Likewise is it clear, from the language of Section 21 of Title III of the National Prohibition Act, which reads:

> "Titles I and III and Section 1, 27, 37 and 38 of Title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of Title II shall take effect and be in force *from and after the date when* the Eighteenth Amendment to the Constitution of the United States *goes into effect.*"

That the Eighteenth Amendment did not become effective at the time of its ratification seems to be recognized also in the National Prohibition cases, 253 U. S. 350, when the court, in the 10th conclusion of its opinion, in referring to the power confided to Congress by Section II of the Eighteenth Amendment, said:

> "That power may be exerted against the disposal for beverage purposes of liquors manufactured *before the amendment became effective,* just as it may against subsequent manufacture for those purposes."

Likewise, in *Street* v. *Lincoln Safe Deposit Company,* 254 U. S. 88, the court said that the Eighteenth Amendment did not indicate

> "any purpose to confiscate liquors lawfully owned

> at the time the amendment *should become effective* and which the owner intended to use in a lawful manner."

Title II of the National Prohibition Act is, what is known as contingent legislation. The general rule with regard to contingent legislation is that a Legislature, whether state or national, *having the power* to pass a law *in praesenti* may make it effective *in futuro;* and with regard to many things what it may do immediately it may also do mediately; as was said in the *People* v. *Reynolds,* 10 Ill. (5 Gil.), p. 1, at p. 10:

> "Necessarily, regarding many things especially affecting local or individual interests, the Legislature may act either mediately or immediately."

See also *Ex parte* Wall, 48 Cal. 279 (315). The converse of this proposition ought also to be true, viz.: what a legislative body cannot do immediately it cannot do mediately; or, if a legislative body cannot pass an Act to become effective in the present, it cannot, in the present, pass an Act to become effective in the future, except that in most of the states, the several constitutions specifically provide for legislation, except in emergency cases, to become effective at a date subsequent to passage. A state legislature, when not otherwise limited by the state constitution, has a present plenary power to legislate, and may therefore pass an Act to become effective immediately or in the future, as it sees fit. Congress also, acting **under powers already granted** by the Constitution, may pass laws to become effective immediately or in the future, as it sees fit; but where Congress has not the power to pass an act **effective immediately,** it should not be held to have authority to pass an Act, effective in the future, when it would receive such authority.

Certain it is that Congress has no power to make

Title II effective immediately. The inhibitions of the National Prohibition Act which became effective immediately on the passage and approval of that Act, were "permissible *only because* in the opinion of Congress the war emergency demands it." *Ruppert* v. *Caffey*, 251 U. S. 264 (301). Not having the authority to pass Title II to become effective immediately, Congress had no power to pass Title II at all on October 27, 1919, for it could not anticipate the grant of power conferred by an Amendment which was not to go into effect until January 16, 1920. What it could not do immediately, it could not do mediately; what it could not do presently, it could not do prospectively. If it had power to pass an Act effective in the future, it had power to pass such Act effective in the present. If the latter power be denied, so also must the former be denied.

The decision in *Dillon* v. *Glos*, 256 U. S. 368, 65 L. Ed. 994, to the effect that the Eighteenth Amendment went into effect one year after its ratification, is supported by a number of decisions construing statutory enactments, and, we see no reason why the same rules of construction as are applied to a statute, should not be applied to a constitution or a constitutional amendment. A valid statute is just as much the law as is a valid constitutional amendment. Applying then the rule, as applied to statutes, it can safely be said that the constitutional amendment did not become the law of the land upon its ratification January 16, 1919, but became the law of the land only when it went into force and effect on January 16, 1920. That the Eighteenth Amendment did not become the law of the land until January 16, 1920, and that until then it granted no power, conferred no authority and imposed no obligation or duty, will more fully appear from the cases hereafter cited and quoted from.

"A statute has not, *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect."

Neisel v. *Moran*, 80 Fla. 98.

Gilbert v. *Ackerman*, 159 N. Y. 118.

In re Howe, 112 N. Y. 100.

36 Cyc. 1192, Notes 6, 7.

City of Davenport v. *R. R. Co.*, 37 Ia. 624.

Jackman v. *Garland*, 64 Me. 133.

"A statute passed to take effect at a future day, is to be understood as speaking from the time it goes into operation, and not from the time of its passage."

Price v. *Hopkins*, 13 Mich. 318.

Rice v. *Ruddiman*, 10 Mich. 125.

"No statute has, *ex proprio vigore*, any force until it becomes the law of the land."

Cargill v. *Power*, 1 Mich. 369, 370.

Charles v. *Lamberson*, 1 Ia. 435, (443).

State v. *Bentley*, 80 Kan. 227.

Shook v. *Laufer*, 100 S. W. (Tex. Civ. App.) 1042.

State v. *Williams*, 173 Ind. 414.

Mills v. *State Board*, 135 Mich. 525.

"Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the executive has no force whatever for any purpose."

36 Cyc. 1192, Notes 6, 7.

State v. *R. R. Co.*, 36 Mont. 582.

See also:

In re Alexander, 53 Fla. 647.

Thompson v. *State*, 56 Fla. 107.

Neisel v. *Moran, supra.*

Schneider v. *Hussey*, 2 Idaho (Hasb.) 8.
Harding v. *People*, 10 Colo. 387.
Churchill v. *Bemis*, 45 Neb. 724.
Rogers v. *Voss*, 6 Ia. 405.
Scales v. *Marshall*, 96 Tex. 140.
State v. *Mounts*, 36 W. Va. 179.

In *State* v. *Dircks*, 211 Mo. 568, the court said:

> "While the amendment *became a part* of the Constitution of this State from the time of the canvass of the vote thereon by the Secretary of State in 1906, *by its terms*, it was not to have actual operation and practical effect, until the election in 1908, the first time when an election for sheriff was to be held under its provisions. That a statute or constitutional provision may have a *potential existence*, but which will not go into actual operation until a future time, is familiar law."

In *Seneca Mining Co.* v. *Secretary of State*, 82 Mich. 573, the court said:

> "Without the authority conferred upon the legislature by this amendment to the Constitution, the Legislature would have no authority to authorize the extension of corporate existence, such as this. The important question, which is, therefore, presented is, when would the amendment adopted by the electors in April, 1899, *take effect as a part of the Constitution?* We must look to that instrument for a reply." (Italics ours.)

In *State ex rel. Stevenson* v. *Tufley*, 20 Nev. 427, the court said:

> "An act of the Legislature which is not authorized by the State Constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence."

Speaking of the effective date of a constitutional amendment, the court, in *People* v. *Gardner*, 59 Barb. 198, at p. 205, said:

> "It is suggested that the new judiciary article (Article 6, *supra*) was 'adopted' when the state canvassers had completed their canvass of the votes. Undoubtedly the electors had adopted the article. They had done all they were authorized by law, to do; but the article was not to become law until a future day. Until that time arrived it was silent and affected no one."

This last case was affirmed in *People* v. *Gardner,* 45 N. Y. 812, where the court, in referring to Article 6, *supra,* which was adopted by the people in November, 1869, said, page 814:

> "* * * the new judiciary article took effect upon the first day of January, 1870, and on and from that day *became operative* as a provision of organic law."

To the same effect, see *People* v. *Norton,* 59 Barb. Sup. Ct. Rep. (N. Y.) 169; *Real* v. *People,* 42 N. Y. 270.

In *Correllis* v. *State,* 78 Fla. 44, the court had under consideration an amendment to the State Constitution, which prohibited the manufacture, sale, etc., of intoxicating liquors. The constitutional amendment was in three sections and is substantially similar in all respects to the Eighteenth Amendment to the Constitution of the United States. Among other things, the court said:

> "**By the terms** of this amendment it was to 'go into effect on the first day of January, A. D. 1919.' This of itself rescued the amendment from the provisions of Article 17, by which amendments to the Constitution become effective upon receiving the approving majority of the votes of the electors at the election * * *."

This case was followed by *Neisel* v. *Moran,* 80 Fla. 98. This case is substantially on all fours with the case now presented by the appellant. The prohibition amendment

to the Constitution of Florida is substantially similar in all respects to the Eighteenth Amendment. The act of the Florida Legislature to make effective the amendment to the Florida Constitution is, or was, at the time this decision was rendered, substantially similar to the National Prohibition Act and was passed, as was the Volstead Act, in anticipation of the amendment becoming effective. The Florida act was declared constitutional, however, but it was found to be valid because of the plenary power residing in State legislatures to pass any law *not forbidden* by the State Constitution. In making this case applicable to the contention of the appellant here made, it is important to note the distinction made by the Florida court between Federal power and State power. The court said:

> "The Supreme Court of the United States has held the act of Congress of October 28th, 1919, known as the Volstead Prohibition Enforcement Act, to be a valid law, *although it was passed by Congress before the Eighteenth Amendment to the Federal Constitution became effective,* on January 16th, 1920, and although Congress *has no Legislative power except such as is granted* to or conferred upon it by the Constitution of the United States. *Rhode Island* v. *Palmer*, 252 U. S. ——, 40 Sup. Ct. 486. If the Volstead Federal Enforcement Statute, enacted October 28th, 1919, after the Eighteenth Amendment to the Federal Constitution had been adopted by the Legislatures of three-fourths of the States of the Union, *but before the amendment became effective,* January 16th, 1920, is a valid law, *when the Congress has no power* to enact laws, except as that power is granted by the Federal Constitution, then Chapter 7736, Laws of Florida, is a valid law, for the reason that the Legislature may enact any statute that is not forbidden by the State or Federal Constitution, etc."

Rhode Island v. *Palmer*, cited by the court, *supra,* was not decided in 252 U. S., but was one of the national pro-

hibition cases decided in 253 U. S. 350, and the court was under a misapprehension, when it took for granted, that the point in question was decided by the Supreme Court of the United States in that case. It is pointed out hereafter under Point I (B) of this Argument, that the point made by the contention of the appellant herein, was not decided in *Rhode Island* v. *Palmer,* or in any other case decided by the Supreme Court of the United States, which we have been able to find. It is worthy of note that the Florida court, apparently wishing to emphasize the correctness of its holding, drew the *a fortiori* conclusion, that if Congress, *without power* granted to it by the Federal Constitution, could pass a law, in anticipation of receiving that power, when the Eighteenth Amendment should become effective, then the Legislature of Florida had a right to pass the Statute in question. The language of the court signifies to our mind that the court, under the misapprehension that this point was decided by the Supreme Court of the United States, at least doubted the correctness of the decision, which it thought the United States Supreme Court had rendered in that case. In *Dunn* v. *County of Rock Island,* 283 Ill. 628 (636), it is said:

> "Upon the facts stated it is argued that if the Act prevents the building of the jail it is retroactive and an interference with constitutional rights. The act did not go into effect until July 1st, 1915, but under section 10* of Article 5 of the Constitution the act *became a law* of the State *upon its approval* by the Governor. The Act is to be construed as prospective, and its prohibition was not effective until July 1st, 1915. A statute passed to take effect at a future day is operative from that day and the intervening period is allowed to enable the public to become acquainted with its provisions, but until it *becomes operative as a law* the public are not compelled to govern their actions by it."
>
> ——*Misprint for Section 16.

See, also, *Board of Supervisors* v. *Keady*, 34 Ill. 293.

In *Pratt* v. *Allen*, 13 Conn. 119, the court said, at page 125:

> "The objection is, that since the amendment giving the election of sheriffs to the people, also directs that such election shall be made, in such manner as shall be prescribed by law, the Assembly must derive their power from this amendment; and as the Act of May, 1838, was prior to the final adoption of the amendment by the people, it was prior to the existence of power in the assembly, and so the act is void; in other words, that the amendment was a grant of power to the Legislature to legislate upon the subject; and that until the amendment received its consummating act, by the vote of the people, no power was conferred by it upon the Legislature. The objection proceeds upon the assumption that the Constitution of this State, *like that of the United States* confers upon the legislative department all the power it possesses; whereas, the fact is not so. The Constitution of the United States is a grant of powers, *where they did not before exist*; the Constitution of this State is a *limitation* of powers already existing."

In *Owing* v. *Speed*, 5 Wheaton Rep. 420, Chief Justice Marshall held that an act, passed by the State of Virginia, with reference to certain lands was not void as being in conflict with Section X of Article I, of the Federal Constitution, prohibiting a state from passing "any law impairing the obligation of contracts." In urging this case, in support of the contention of the petitioner, we call the court's attention to the fact that Article 7, of the Constitution of the United States provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." Virginia was among the nine States first ratifying. New Hampshire was the ninth State to ratify and this it did, June 21st, 1788, and thereupon the Constitution of the

United States became established. Subsequently, but before March 4th, 1789, the act of the Virginia Legislature was passed, but it was held to be valid because the Constitution of the United States in its entirety did not go into effect until March 4th, 1789.

In 28 Cyc., p. 365, it is said:

> "A municipal charter in whatever form is a statute of the State, and the organic law of the corporation. It gives the municipality its power to enact by-laws, just as the Federal Constitution gives the Congress its power of legislation."

Bearing in mind this analogy between the power of a municipality and the power of Congress, we cite the case of *Ellis* v. *City of Cleburne,* 35 S. W. (Tex.) 495, (writ of error denied by the Supreme Court.) The Constitution of Texas provided that—

> "If it shall appear from the election returns that a majority of votes have been cast in favor of any Constitutional Amendment, the said Amendment *shall become a part* of the Constitution and proclamation shall be made by the Governor thereof."

The court held that an amendment to Article 8 of the Constitution, authorizing certain cities to incur indebtednesses for the erection of water works, which was adopted by a vote of the People on August 14, 1883, and the result proclaimed by the Governor on September 25, 1883, was not *in effect* on September 13, 1883, so as to authorize a city *on that date* to incur an indebtedness for the erection of certain water works. The court held in substance the following propositions:

> A. An Ordinance is without authority and void which is passed in anticipation of a Constitutional Amendment, which, when effective, would confer such authority.
>
> B. A contract made by the City was not valid by reason of having been made in anticipation of the adoption of the Amendment.
>
> C. If the Ordinance, authorizing the execution of

the contract, was enacted *before* the Constitutional Amendment *became operative,* and was, therefore, invalid, the contract based upon the Ordinance was likewise void, even though it was not delivered until October 1, 1883, after the Amendment became operative.

D. A City cannot ratify a contract which at the time it was entered into was *ultra vires.* A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. (Citing Dillon on Municipal Corporations, 4th Ed., Sec. 463.) No subsequent Act can make an *ultra vires* contract effective.

To the same effect, see *Reade* v. *City of Durham,* 173 N. C. 668; *City of Duluth* v. *Duluth St. Ry. Co.,* 60 Minn. 178.

We have cited and quoted excerpts from the principal cases supporting the contention of the appellant. Other cases to which we respectfully refer the court are:

Price v. *Hopkins,* 13 Mich. 318.

Bilbrey v. *Poston,* 63 Tenn. 232.

Girdner v. *Bryan,* 94 Mo. A. 27.

Phy v. *Wright,* 75 Ore. 428.

Schwartz v. *Leiberman & Co.,* 2 Tex. App. Civ. Cases, Sec. 289.

Hamilton v. *Vaughan,* 204 Mich. 439.

DeWar v. *People,* 40 Mich. 401.

State v. *Cain,* 52 La. Ann. 2120.

State v. *Schnitzer,* 16 Wyo. 479.

State v. *Kyle,* 166 Mo. 287.

Lloyd v. *Hamilton,* 52 La. Ann. 861.

Point I.

B.

Objections Answered.

(1) The Supreme Court of the United States has not had this objection to the validity of Title II of said act presented to it in any case heretofore arising. It was not passed upon in *Rhode Island* v. *Palmer,* or any of the other cases included within the *National Prohibition* cases, 253 U. S. 350. In those cases the contention that the Volstead Act was invalid, was, as we read the decision, based upon the major contention that the Eighteenth Amendment itself was unconstitutional. The court at the outset in those cases said:

> "We here are concerned with seven cases involving the validity of that amendment and of certain general features of the National Prohibition Law, known as the Volstead Act."

Mr. Justice McKenna, in his dissenting opinion, said:

> "This case is concerned with the Eighteenth Amendment to the Constitution of the United States, its validity and construction."

Neither was it decided in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 164. The contention there was that the Eighteenth Amendment denied to Congress, before its effective date (January 16, 1920), the power to pass any prohibition of the liquor traffic, the argument being that the amendment guaranteed to manufacturers and dealers a year's grace. The decision of the court (p. 164) was to the effect that the Eighteenth Amendment was not a denial of the war power of Congress; the only point decided was that Congress had power to pass such prohibition *as a war measure* for the conservation of the resources of the country, and that the Eighteenth

Amendment did not operate to destroy or curtail that power.

In *Ruppert* v. *Caffey*, 251 U. S. 264, Elihu Root and William D. Guthrie argued that:

> "The language of the Eighteenth Amendment presents a very grave question as to the power of Congress to enact prohibition legislation *effective before* the expiration of one year from the ratification of that amendment."

It will be noted that the objection merely went to the power of Congress to pass such legislation *effective immediately*, and involved only Title I of the Volstead Act, counsel taking it for granted that Title I was passed pursuant to the provisions of the Eighteenth Amendment. The objection did not assert the lack of a then present power in Congress to legislate at all on the subject. The court held that Title I was not passed pursuant to the Eighteenth Amendment, but pursuant to the war powers of Congress. The court said, page 301:

> "Prohibition of the manufacture of malt liquors with an alcoholic content of one-half of one per cent or more, is permissible *only because* in the opinion of Congress the war emergency demands it."

Objections Answered (Cont'd).

(2) Article 5 of the Constitution of the United States, which provides that amendments when ratified by the Legislatures of three-fourths of the states "shall be valid to all intents and purposes, as part of this Constitution," in nowise negatives the construction here contended for by petitioner, viz: that the Eighteenth Amendment did not become *an operative* or *effective* part of the Constitution until January 16, 1920. Such construction is consistent with the provisions of Article 5. If the Eighteenth Amendment had specified no time when it was to go into effect, it undoubtedly would have become operative, immediately upon its ratification under the provisions of Article 5. To paraphrase the language of the Supreme Court of Florida, in *Correllis* v. *State,* 78 Fla. 44 (heretofore quoted):

> "By the terms of this Amendment it was to go into effect on the 16th of January, 1920. This of itself rescued the Amendment from the provisions of Article 5."

The Eighteenth Amendment upon its ratification became no doubt a part of the Constitution and was valid to all intents and purposes, but until January 16th, 1920, it did not go into effect; it was unenforceable; it did not become an *operative* part of the Constitution; it lay dormant; suspended; *ex proprio vigore* it had no force; its existence as law was potential; it was silent and affected no one; it vested no power. The situation presented has its analogy in state statutes and state constitutional amendments. Speaking of a constitutional amendment the court in *State* v. *Cain,* 52 La. Ann. 2120, said:

> "* * * it and every part of it was intended to lie dormant and directed to lie dormant until, etc.; * * * everything pertaining to the article, * * * was suspended until, etc."

And the court, in *State* v. *Dircks,* 211 Mo. 568 (*supra*), also speaking of a constitutional amendment, said:

> "While the amendment *became a part* of the Constitution from the time of the canvass of the votes, * * * *by its terms,* it was not to have actual operation and practical effect until, etc. * * * That a statute or *constitutional provision* may have a *potential existence,* but which will not go into actual operation until a future time, is familiar law."

State statutes are generally passed and approved prior to their effective dates. By the Constitution of Illinois, for instance, laws take effect on the first day of July next after their passage, unless an emergency exists. After their passage and approval they become *a part* of the statutes of the State, and unless they offend against some constitutional provision, they become valid law; but until the time arrives when they shall go into effect, they confer no power, speak with no authority, are silent and affect no one. Such was the holding in *Dunn* v. *County of Rock Island,* 283 Ill. 628 (636 heretofore quoted). In the case last cited, it was held that until a law becomes operative as a law the people are not compelled to govern their actions by it.

So with the Eighteenth Amendment. It became a part of the Constitution under Article V upon its ratification, but it did not *become operative* as law until, by its own terms, it went into effect January 16th, 1920. The intervening period was allowed to enable the public to become acquainted with its provisions, and to adjust itself to its inhibitions. During that period it was apparently intended by the legislatures of those States which ratified it, to be altogether operative or else altogether inoperative. There is no language in any of its sections which would make it operative for one purpose and inoperative for another. Nowhere does it specify that

Congress should have authority to pass legislation under it to become effective prior to the expiration of the one year period of limitation fixed in section 1. Certain it is, at least, that the amendment as law was inoperative to grant Congress power to enact Title II of the National Prohibition Act to become effective immediately on its passage. As it was inoperative for that purpose, it was, during the period between ratification and January 16th, 1920, inoperative altogether. Congress, having no constitutional authority to enact Title II of the Volstead Act to become effective immediately, had no constitutional authority in October, 1919, to make Title II effective in the future. As heretofore stated, a State Legislature under its plenary power may enact a statute which, while it becomes law immediately upon passage and approval, does not come to life until the time fixed by the State Constitution; but unlike a State Legislature, the very power of Congress to legislate does not come to life or into being until a constitutional amendment goes into effect.

Under Article V of the Constitution, the Eighteenth Amendment upon ratification might have become "valid to all intents and purposes as part of this Constitution" without having granted to Congress any power whatever. Witness for instance the Ninth, Tenth and Eleventh Amendments, which are completely self-executing in their provisions and in their nature, grant no power to Congress and yet became "valid as part of the Constitution" upon ratification. Suppose that the Eighteenth Amendment had been submitted and ratified in such form as to be completely self-executing in its porvisions, with its present Section 1, unaltered and an added provision specifically denying to Congress power to legislate on the subject of intoxicating liquors. Or suppose such amendment without a provision specifically deny-

ing that power of Congress; for, if the amendment were completely self-executing, it would impliedly deny such power to Congress anyway. Would anyone doubt, but that, upon ratification, the amendment, as supposed, became "valid to all intents and purposes as part of this Constitution" under Article V? And would anyone doubt but that also such amendment, while "valid as a part of the Constitution" upon ratification, remained inoperative until January 16th, 1920? If the amendment, as supposed, could deny power altogether to Congress to legislate, and, at the same time, be consistent with Article V, then there is no good reason why the amendment, as ratified, was not consistent with Article V, while remaining inoperative to grant power to Congress to legislate until January 16th, 1920. In fact, if the self-executing provisions of the amendment, as supposed, would remain inoperative until January 16th, 1920, it would seem, *a fortiori*, that the power granted to Congress, by the amendment as ratified, to execute its provisions, should remain inoperative until January 16th, 1920.

Perhaps the situation presented by the Eighteenth Amendment in its relation to Article V of the Constitution can best be described as being comparable to the National Bankruptcy Act in its relation to State Insolvency Statutes. The going into effect of a Federal bankruptcy act automatically *suspends* the operation of a state insolvency statute covering the same ground. It is said in 14 R. C. L., p. 633:

> "But a State statute is not thereby repealed; its *operation is only suspended* during the period the national act remains in force. On the repeal of the Bankruptcy Act a State insolvency statute comes in operation without re-enactment and applies to acts occurring during its suspension. * * * It is not the passage of the federal act, but it is the taking effect thereof, which suspends the State statutes.

> The State courts may continue to conduct insolvency proceedings during the interval between the passage of the act and the time set for its effect. * * * Even during the operation of a federal act, a State Legislature may pass an insolvency act. Such an act, as to the subject matter, covered by the federal act, will remain ineffective until the repeal of the latter, but then comes into force."

In other words, the State insolvency laws, where they do not offend against some provision of the State or Federal Constitution, are "valid to all intents and purposes as part of the statutes of the State," while at the same time, during the period a federal act is in force, they are unenforceable, inoperative, confer no authority, grant no power, are silent and affect no one; they exist potentially but are of no force or effect whatever. So with the Eighteenth Amendment. Upon its ratification it was "valid to all intents and purposes as part of the Constitution," while at the same time, during the interval between ratification and January 16th, 1920, when as said in *Dillon* v. *Glos, supra,* the amendment, "by its own terms was to go into effect," the several state statutes regulating the manufacture and sale of intoxicating liquor were in full force and effect *as supreme law* within each particular state, and *the operation* of the Eighteenth Amendment *was suspended* until January 16th, 1920.

That an amendment may be ratified pursuant to the provisions of Article V of the Constitution, thereby becoming valid as part of the Constitution, and at the same time be inoperative, is further evidenced by the provisions of Section 3 of the Eighteenth Amendment, which reads:

> "This article shall be *inoperative* unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission hereof to the states by the Congress."

Article V of the Constitution fixes no limitation of time for ratification; it simply provides that an amendment when ratified by three-fourths of the States shall be valid as part of the Constitution. Hence, we take it, that if the Eighteenth Amendment had not been ratified within the seven year period of limitation, but had been ratified shortly thereafter, it would have nevertheless been valid under the provisions of Article V as a part of the Constitution, although of course an inoperative part of it. Congress apparently took for granted that the amendment, no matter when ratified, would become *valid as part* of the Constitution in accordance with the provisions of Article V upon ratification by three-fourths of the States, even though the amendment might expressly declare otherwise. Manifestly the word "inoperative" was used advisedly. The words "invalid," "void," "shall not be valid as a part of the Constitution unless, etc." would have run counter to Article V, since under that article the amendment would, no matter what words were used, be valid as part of the Constitution. But the word "inoperative," appearing in Section 3 of the Eighteenth Amendment, is not inconsistent with the words "valid as part of" appearing in Article V of the Constitution. As already pointed out, State insolvency laws are "valid as part of State statutes," although *inoperative* when touching the same subject matter as a federal bankruptcy law. So a State statute may become *a valid law* when passed and approved although inoperative until a future day when *it is to go into effect.*

Dunn v. *County of Rock Island*, 283 Ill. 628 (*supra*).

If the Eighteenth Amendment could *by its own terms* fix, in one section, a period of limitation, after which it would be *inoperative*, even though ratified subsequently to the period thus fixed, then no good reason appears,

why the amendment could not *by its own terms* also fix, *in another section, a period of limitation* within which, after ratification, it would be *inoperative.* And this we contend it did, fixing by virtue of section one (1) the period of one year within *which, after ratification, it* was to be *inoperative.*

Objections Answered (Cont'd).

(3) It will not do to say that the prohibition of the Eighteenth Amendment went into effect January 16th, 1920, but that the Eighteenth Amendment itself went into effect when ratified, on January 16th, 1919, or to put it another way, that the prohibitory portion of the Eighteenth Amendment went into effect January 16th, 1920, while the Eighteenth Amendment itself went into effect when ratified. This, for the reason, that the prohibition of the Eighteenth Amendment is not one thing and the Eighteenth Amendment another thing. The prohibition *is* the Eighteenth Amendment, and the Eighteenth Amendment *is* the prohibition. The Eighteenth Amendment has no existence, except as a prohibitory law. It is incorrect and misleading to speak of the "prohibitory portion" of the Eighteenth Amendment. The amendment is an indivisible unit and cannot be divided into parts or portions; as was said in *Board of Supervisors* v. *Keady*, 34 Ill. 293 (296):

> "The court is not aware of any rule by which an act of the Legislature, regulating the rights and duties of citizens, becomes a law, piece-meal * * *."

The purpose of the Eighteenth Amendment was to prohibit intoxicating liquors. If the amendment was ineffective for that purpose until January 16th, 1920, then, until that time arrived, it was ineffective for the entire object of the law.

See *People* v. *Rose*, 166 Ill. 422 (430).

Objections Answered (Cont'd).

(4) It will not do to say that the Eighteenth Amendment became effective as an *operative* part of the Constitution, when ratified by the Legislatures of three-fourth of the States, and that it merely fixed a time in the future for the inhibition of liquors, for if so, it became by virtue of Section 2, Article 6, of the Constitution of the United States the supreme law of the land. And necessarily, if so, it became the supreme law of the land the moment it was ratified. But by Article 10 of the amendments to the Constitution, the powers not delegated by the States were reserved to them. If, therefore, in the interim between the ratification of the Eighteenth Amendment, and the date when it went into effect, to-wit, January 16th, 1920, a State had passed a law or had adopted an amendment to its Constitution, self-executing in its provisions, regulating the manufacture and sale of intoxicating liquors, it would scarcely be contended that such law, or such amendment, would be in violation of the Eighteenth Amendment, as that amendment *by its terms* did not go into effect until January 16th, 1920. Such a law, or such an amendment, would not be in conflict with the Eighteenth Amendment, because no question of conflict could arise until there was a law *in force and effect* which would give occasion for the conflict. The situation thus described is also paralleled by the operation and effect of State insolvency laws in their relation to the National Bankruptcy Act. The law in reference thereto is stated in 14 R. C. L., p. 633, as follows:

> "The State courts may continue to conduct insolvency proceedings *during the interval between* the passage of the act and *the time set for its effect.*"

Such a law, or such an amendment, would, under the

provisions of Article 10 of the amendments to the Constitution of the United States, be the supreme law within the State which enacted or adopted it. If so, the Eighteenth Amendment would not be the supreme law of the land within that State; but this cannot be, for there cannot be two supreme laws. Therefore, we must conclude that in the interim existing between the ratification of the Eighteenth Amendment and the 16th of January, 1920, the Eighteenth Amendment was not the supreme law of the land, and, therefore, was not an *operative* part of the Constitution of the United States.

Objections Answered (Cont'd).

(5) It will not do to say that Section 2 of the Eighteenth Amendment conferred power on Congress to pass Title II of the National Prohibition Act in October, 1919.

Section 2 of the Eighteenth Amendment provides:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This section was ratified as an integral part of the Eighteenth Amendment. It was not ratified separately. It was an inseparable unit in an indivisible article. It added nothing to the power of Congress.

Its sole efficacy was to allow the several States the exercise of their original police power, not inconsistent with the first section of the Eighteenth Amendment.

See *U. S.* v. *Lanza*, 260 U. S. 377.

Whatever power Congress has to regulate the traffic in intoxicating liquors it received from the Eighteenth Amendment as a whole, and not from Section 2; as was said in *U. S.* v. *Cohen*, 268 Federal, 420 (Dist. Ct. E. D., Mo.), at page 425:

> "It may be considered that the provisions of the Volstead Act in so far as they provide for the exercise of police powers by the Congress, would have been unwarranted and unconstitutional before the adoption of the Eighteenth Amendment."

The second section of the Eighteenth Amendment, insofar as it relates to the power of Congress, merely confirmed the implied power which it received from Section 1, of the amendment.

See *Ex Parte Crookshank*, 269 Fed. 980, where, at page 986, the court said:

> "The truth is, in my judgment, that too much concern seems to have been manifested because of the incorporation of Section 2 into the Eighteenth Amendment. The power thereby sought to be conferred upon Congress would have been conferred by the adoption and ratification of Section 1 alone; a power being accorded to the Federal Government, Congress even in the absence of an express grant, would be authorized to legislate in the exertion of that power."

See, also, paragraph 18, section 8, of Article 1, of the Constitution of the United States. The court, in *Ex Parte Crookshank,* also quotes from Hamilton's 31st Number of the Federalist, as follows:

> "It may be affirmed with perfect confidence, that the continual operation of the intended Government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers."

In the *National Prohibition cases,* 253 U. S. 350, the court said:

> "I take it that if the second section of the article did not exist, no one would gainsay that the first section in and of itself, granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become fully operative."

It will be noted that when the Supreme Court, in *Dillon* v. *Glos,* 256 U. S. 368, 65 L. ed. 994, said that the Eighteenth Amendment, "by its own terms was to go into effct one year after being ratified," it spoke of the article as a whole; presumably, the court meant that Section 2 went into effect at the same time that Section 1 went into effect. This rule of construction is supported by the authorities.

In speaking of the constitutional provision to the effect that an act of the Legislature should not become a law until the expiration of sixty (60) days from the end of the session (such was the law in Illinois prior to 1870), the Supreme Court of Illinois, in *Wheeler* v. *Chubbuck,* 16 Ill. 361, held, that:

> "In order to take an act out of the constitutional provision the Legislature must direct that the act, as a whole and entirety, shall take effect at a different time; and that it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period."

The court, on that occasion, said, that

> "the direction must be made in a clear, distinct and unequivocal provision, and could not be helped out by any sort of intendment or implication."

In *Schneider* v. *Hussey,* 2 Idaho (Hasb.) 8, it is said:

> "It will not be contended that one section of an act will take effect or be in force at an earlier date than other sections, unless the act itself shall so state."

To the same effect, see, also, *State* v. *Williams,* 173 Ind. 414; *State* v. *Paul,* 87 Wash. 83; *McArthur* v. *Franklin,* 16 Ohio State, 193, 203; *Leyner* v. *State,* 3 Ind. 490; *Grant* v. *Alpena,* 107 Mich. 335; *State* v. *Edwards,* 136 Mo. 360; *Ex Parte AhPah,* 34 Nev. 283.

Objections Answered (Cont'd).

(6) It will not do to say that the Eighteenth Amendment, by becoming effective January 16th, 1920, validated the act of Congress of October, 1919.

In *State ex rel. Stevenson* v. *Tufley,* 20 Nev. 427, it is said:

> "The act being void, no subsequent adoption of an amendment to a Constitution, * * * would have the effect to infuse life into a thing that never had any existence."

To the same effect see:

Newberry v. *U. S.,* 256 U. S. 232 (254).

See, also, *Girdner* v. *Bryan,* 94 Mo. A. 27.

Ellis v. *City of Cleburne,* 35 S. W. (Tex.) 495, to the effect that no subsequent act can make an *ultra vires* act effective.

See, also, *DeWar* v. *People,* 40 Mich. 401.

Point I.

C.

Conclusions.

We conclude, therefore, that when Congress attempted to pass Title II of the National Prohibition Act, in October, 1919, it was endeavoring to make operative and effective an amendment which itself at that time, was inoperative and ineffective for any purpose, and vested in Congress no power until January 16th, 1920, to pass any laws pursuant to it.

We conclude also that Article V in no way conflicts with the construction, which we here contend should be given to the Eighteenth Amendment, viz: that upon ratification it became valid as a part of the Constitution, but did not then become an operative or effective law.

We believe that we have established, on reason and authority, that Title II of the National Prohibition Act is in conflict with Section 1, of Article I, of the Constitution of the United States, providing that "all legislative powers herein granted shall be vested in a Congress of the United States, etc.," in that, the power sought to be exercised in October, 1919, was not one of the powers granted to Congress at that time; and is also in conflict with Section 8, of said Article I, which enumerates the powers of Congress, in that, the power sought to be exercised by Congress in October, 1919, is not enumerated among the powers granted to Congress by Section 8 of said Article I, and was not granted by any of the amendments to the Constitution of the United States in force and effect at the time Congress sought to enact Title II of the National Prohibition Act. The conclusion follows, that Title II of the National Prohibition Act is unconstitutional and void.

Point II.

Section 24 of Title II is an Invasion of the Judicial Power.

The legislative intent in drafting Section 24 of Title II of the National Prohibition Act was to provide for an expeditious mode of trying the many cases, which Congress prophesied would arise in the enforcement of the act. Hence the provision for trial without a jury before a chancellor and all under the guise and label of "contempt."

With the federal jurisdiction created by the Eighteenth Amendment, the Districts Courts are burdened by Section 24, with what was, prior thereto, the business of state police courts. So far reaching is the newly created federal police jurisdiction, that nothing is left to the con-

trol of the courts. Not even are the district courts permitted to exercise plenary discretion in trying contemptuous violations of injunctional orders under the act.

Section 24 provides:

> "Any person found guilty of contempt under the provisions of this section shall be punished by a fine *of not less* than $500 *nor more than* $1,000 or by imprisonment of *not less* than thirty days *nor more* than twelve months or by both fine and imprisonment."

Thus, if the evidence in a proceeding under Section 24 discloses that the contemnor was guilty of a trivial violation of the injunctional order, the chancellor could do nothing but fine the contemnor not less than $500 or imprison him for not less than thirty days. And this, though the court thought that a fine of $25 or imprisonment for two days was ample punishment for the infraction of the injunctional order.

As ancient as the courts themselves, is the power to punish contemnors of the authority of the judiciary. A court without power to compel obedience to its orders would be a useless institution. As said by Mr. Justice Brewer, in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, at page 326:

> "The power to punish for contempt is inherent in all courts. * * * (327). The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded."

The law of the land is synonomous with the maintenance of the authority of the courts. Only by obedience to judicial mandate can personal and property rights be secure. Leave to personal choice obedience to judicial authority, and law and order would soon be chaos.

The very nature and purpose of a court, inherently

demands the power to punish for contempt. That power transcends legislative limitation and is not derived from any statute.

See *Ex Parte Terry*, 128 U. S. 289, 302.

The judicial power of the Federal Government is defined by Article III, Section 1 of the Constitution:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

And Article I, Section 8, par. 9 of the Constitution provides that Congress shall have power

> "To constitute Tribunals inferior to the Supreme Court."

Congress did exercise that power by the Act of 1831 creating the District Courts. In that act (now Section 268 of the Judicial Code) Congress defined the particular instances wherein the District Courts could exercise the power to punish for contempt; but did not in any wise interfere with the power of those courts fully to exercise that power in the particular instances listed in the act. In other words, the Act of 1831 is not a limitation upon the extent of the power to punish for contempt, but is a specification of the instances where the power may be exerted.

See *Interstate Com.* v. *Brinson*, 154 U. S. 447; *in Re Cuddy*, 131 U. S. 280; *Ex Parte Robinson*, 19 Wall. 504; *U. S.* v. *Toledo Newspaper Co.*, 220 Fed. 458 (affirmed in 237 Fed. 986, C. C. A. 6 Cir.); *in Re Judith Gap Commercial Co.*, 1 Fed. (2d Ser.) 508; *People* v. *Peters*, 305 Ill. 226.

The Supreme Court of California, in *Ex Parte Garner*, 179 Cal. 409, in sustaining the validity of a contempt statute, which authorized the imposition of a fine not ex-

ceeding five hundred ($500) dollars or imprisonment not exceeding five (5) days, or both, said:

> "The Legislature may not, whether by procedural rules, or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of the court to punish for contempt; yet it may provide rules of procedure and fix *the maximum* penalty which, if adequate for the purpose designed, must be deemed operative in controlling the action of the court."

Many of the states have set a maximum penalty for the punishment of contempts, and these have usually been held to be valid, on the ground, that the Legislature has thereby made effective the Constitutional inhibition against the imposition of excessive fines, and the infliction of cruel and unusual punishments. We have searched the statutes of many states, and have been unable to find any statute which fixes a minimum penalty as a punishment for contempt other than so-called liquor statutes, which have for the most part been modeled after the National Prohibition Act. The fixing of a minimum penalty, clearly invades the discretion of the court in carrying into effect its inherent power to punish for contempt. Many instances might be supposed where a nominal fine or a few days in jail would be adequate punishment for the contempt charged. It can well be conceived that the imposition of a minimum fine of five hundred ($500) dollars, under the provisions of Section 24 of the National Prohibition Act, would, in many instances, be a violation of the constitutional provision, forbidding the imposition of excessive fines.

Point III.

Section 24 of Title II of the Prohibition Act Violates the Sixth Amendment to the Constitution.

The Sixth Amendment provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *; to be confronted with witnesses against them * * *."

As demonstrated in the preceding section of this argument, the minimum and maximum penalties of Section 24 do not comport with the plenary power of courts of equity to punish contemnors. If the section is to stand at all, it must stand as a definition of newly created crime to be tried without a jury.

A crime is defined to be "a wrong directly or indirectly affecting the public, to which *the State* has annexed certain punishments and penalties" (16 C. J. 951). What is Section 24 but an attempted definition of a wrong affecting the public to which the government has annexed punishments and penalties? It, therefore, seeks to define a crime of a distinct and separate class from contempt proper.

The section creates a new statutory crime; either that, or it is a manifest invasion of the judicial power. As a newly created statutory crime, it should be properly labeled, e. g., "Obstruction of Justice by Contempt," in analogy to such offenses as were unknown to the common law, but which have since been created and specially designated, e. g., "Larceny by Bailee," "Embezzlement by Agent," etc.

In *Ex Parte, in the Matter of Philip Grossman,* Petitioner, No. 24, Original, October Term 1924, it was de-

cided by this court that contempt of court was an offense against the United States within the pardoning power of the President. Nowhere in the opinion of the court is Section 24 of Title II of the National Prohibition Act referred to. This court, in the *Grossman case,* seems to have treated only of that class of contempts which was known to the common law. It does not seem to have been pointed out to the Court, in that case, that the criminal contempts provided for in Section 24 were, as shown hereafter, unknown to the common law, and to the framers of the Constitution. The conclusion, that common law contempts only were under consideration by the court, we deduce from the use by the court of the words, "common law contempts" and from the reasoning of the court to the effect that "offenses against the United States" included "common law offenses in the nature of contempts against the dignity and authority of United States Courts" and that since the king of England, prior to the Revolution, had power to pardon contempts of court, the framers of our Constitution with the background of the common law and English history in mind, intended, in drafting the Constitution, to include offenses in the nature of contempts, within the scope of the pardoning power of the President. As a predicate for the argument, which we make following, we desire to call the court's attention to two statements from the Grossman opinion—first, "For civil contempts, the punishment is remedial and for the benefit of complainant and a pardon cannot stop it;" second, "while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis,* and not criminal prosecutions, within the Sixth Amendment or common understanding." When this court speaks of contempts as being of-

tion 24, and the proceeding to punish it under Section 24, as a criminal prosecution.

If the contempt provided for in Section 24, is not a common law contempt, and if the proceedings to punish it are "criminal prosecutions," within the meaning of the Sixth Amendment, then certainly Section 24 is unconstitutional, because it provides that the court "may summarily try and punish the defendant."

Is the contempt provided for in Section 24, a common law contempt, and are the proceedings provided for in Section 24 to punish the violation of an injunction, "criminal prosecutions"?

The contempt, so provided for, is not a common law contempt, for the following reasons:

1st. Without Section 24, the court would have the undoubted right to punish a violation of an injunction, issued under Section 22, under the provisions of Section 268 of the Judicial Code, or it would have such right under the common law, pursuant to its inherent power to punish for contempts. But we have demonstrated that such a proceeding would be a civil one, and the contempt involved would be civil, and not criminal. And for civil contempts a fine only could be imposed.

See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418.

This was likewise the rule at common law.

Moreover, "For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it."

See *Ex Parte, in the Matter of Philip Grossman,* Petitioner, No. 24, Original.—October Term, 1924.

2nd. At common law the defendant in a criminal contempt proceeding had the right to purge himself of the

alleged contempt by filing a sworn denial. In 13 C. J. p. 74, Section 109, it is said:

> "At common law the sworn answer of the accused validly denying the alleged contempt was absolutely conclusive and entitled defendant to be discharged."

See, also, *People* v. *Gilbert,* 281 Ill., p. 619; *People* v. *McDonald,* 314 Ill. 448; *Kirk* v. *U. S.*, 112 C. C. A. 531. But this is not so under Section 24, for as is therein recited, "the trial may be had upon affidavits *or either party* may demand the production and oral examination of the witness."

The proceedings under Section 24 to punish the violation of an injunction issued under Section 22, are criminal prosecutions for the following reasons:

1st. Nowhere in Section 24 is it provided specifically, that the violation of an injunction is or shall be a contempt of court. It provides that "In the case of the violation of any injunction * * * the court * * * may summarily try and punish the defendant." For what? Presumably for the offense of violating an injunction. The offense is tried as a distinct crime. No statute was needed to confer jurisdiction on a court to try an injunction violator for contempt. "The defendant is to be punished" not the *respondent,* and the defendant is to be punished, as later appears in the section, by imprisonment, if the court so wills. The language imports a criminal prosecution. But the section takes it for granted that the trial shall be for contempt, without specifically so providing. The language is this, "The proceedings for contempt shall be commenced by filing, etc."

2nd. The language of Section 24 measures up to the definition of a crime. See 16 C. J. 951 (quoted *supra*). The Government by statute fixes the penalties—a mini-

mum and a maximum—and not the court. The discretion of the court is confined within limits, just as in criminal statutes.

3rd. The violation of an injunction ceases to be what it was at Common Law, and what it was, at and prior to the adoption of the Constitution, viz: a civil wrong or tort, to-wit: a civil contempt, but becomes instead something criminal. That something is a criminal offense, and not a criminal contempt, even though the statute may call it such; it could only be a criminal contempt, if it were directed against the power, dignity or authority of the court; its nature cannot be changed by calling it what it is not. Like the violation of an injunctional order abating a house of ill-fame as a nuisance, its nature is civil. See *People* v. *Buconich,* 277 Ill. 290. The primary purpose of the proceeding, is to enforce the civil remedy of the United States, the complainant in the equity suit, against a defendant, who is the other party to the equity suit. Such proceedings are not brought to vindicate public authority, since, for that purpose, the United States Government has an adequate remedy by enforcing its criminal statutes.

That the contempt is civil in its nature, is recognized by public officials charged with its prosecution. The uniform practice in such proceedings, as it was in this case (Rec., 20, 6), is to institute, entitle and try such proceedings as part of the main cause in equity. This is an important test in determining whether a proceeding be civil or criminal.

Gompers v. *Bucks Stove & Range Co.,* 221 U. S. 418.

4th. At common law, at and prior to the adoption of the American Constitution, the maintenance of a public nuisance was a crime, punishable and abatable in the courts of criminal jurisdiction only. Hence, the effect of

making such an offense punishable and abatable in a court of chancery, is to deprive a defendant of his constitutional right, to have an indictment preferred against him, and a trial by jury. In *Hedden* v. *Hand,* 90 N. J. Eq. 583 (holding a statute unconstitutional, similar to the one here in question), the court said:

> "It is idle to entertain the thought for a single moment that the Legislature can change the nature of an offense by changing the forum in which it is to be tried."

To the same effect see *U. S.* v. *Lot* 29, *Blk.* 29, *Highland Park,* 296 Fed. 729 (holding Sec. 22 unconstitutional and inferentially Sec. 24 also).

5th. Section 24 provides that upon an information filed the court "shall forthwith cause a *warrant* to issue, under which the *defendant* shall be *arrested.*" Here we have the application of a strictly criminal proceeding, viz: "Warrant" and "arrest," not rule to show cause, citation or attachment.

We conclude, therefore, that since the offense mentioned in Section 24, is not a common law contempt, and since it is civil in its nature (—that is, if such offense is treated as a contempt), then it is not within the pardoning power; and if it is not within the pardoning power it is not "an offense against the United States"; yet the United States has imposed criminal penalties; we have also shown that the proceedings under Section 24, to punish the offense of violating an injunction are criminal prosecutions; therefore, the offense mentioned must be a statutory crime.

Point IV.

The Injunctional Order upon which the judgment is founded is absolutely void as District Courts are without power and are expressly prohibited by Equity Rule 73 from granting temporary injunctions without notice.

By Sections 913 and 917 of the Revised Statutes, the Equity Rules are given the same force and effect as Acts of Congress. These rules constitute a part of the Judicial Code. Rule 73 provides:

> "No preliminary injunction shall be granted without notice to the opposite party."

This rule goes to the source of the power of the District Court to enter the injunctional order. Its effect is to prohibit the exercise of the injunctive power without complying with its terms. Unless notice of the application for an injunction be given to the defendant, the District Court is shorn of power to act. Thus the rule goes to the jurisdiction of the court to enter an injunctional order.

It calls for no extended argument to show that an injunction granted by a court without power or jurisdiction to enter it is absolutely void and cannot be the basis of a valid contempt proceeding. A void injunction cannot serve as the basis of a valid judgment finding a party guilty of contempt for violating it.

Drew v. *Hogan*, 26 App. Cas. D. C. 55, 61.

Cathey v. *Norfolk & W. Ry. Co.*, 228 Fed. 26 (C. C. A. 4th Cir.).

Bank of United States v. *White*, 8 Peters 262, 269.

Northwestern Mut. Life Ins. Co. v. *Keith*, 77 Fed. 374.

United States v. *Barber Lumber Co.*, 169 Fed. 184.

The court will note that a temporary restraining *order* was *not* issued in this case. The order here is that of a temporary *injunction* and is in fact so entitled. The language of the order is:

> "It is ordered that pending the final hearing and determination, and until the conclusion of the trial of said bill for injunction against said nuisance, etc." (Rec., 14.)

The record does not disclose, and the government did not attempt to prove that the appellant was notified of the application upon which the injunctional order was based.

Section 22 of Title II of the Prohibition Act provides:

> "An action to enjoin any nuisance defined in this title may be brought in the name of the United States * * * *Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases.* If it is made to appear that such nuisance exists, *a temporary writ of injunction shall forthwith issue.*"

So the recital is that the proceeding under Section 22 "shall be brought and tried as an action in equity." As an "action in equity" the Equity Rules control the procedure; and Rule 73 is positive in its command that:

> "*No preliminary injunction shall be granted without notice to the opposite party.*"

Not a word appears in Section 22 from which even an inference can be drawn, that it is not necessary to notify a defendant of the application for injunction. Even though there were such inference, it would have to yield to the positive declaration of the section, that "such action shall be brought and tried as an action in equity."

Clearly Section 22 provides for a temporary injunction in the usual form of equity procedure—that and nothing more. The settled course of equity procedure in the Fed-

eral courts gave to the petitioners the substantive r
of notice of the application for the temporary injunc
No such notice was given them prior to the entry o
injunctional order.

It follows, that the injunction herein, was entere
violation of Equity Rule 73, by a court expressly
hibited by the said rule and its statutory reaffirma
from entering it without notice to the appellant. T
the entire contempt proceeding was void *ab initio.*

For the reasons stated in this Brief and Argument
respectfully submit that the court below erred in
taining respondents' demurrer and dismissing ap
lant's petition. We respectfully ask this Honor
Court to reverse the decision of the District Court
directions to that Court to reinstate the petition an
overrule the demurrer.

Respectfully submitted,

Thomas D. Mas

Michael J. Th

Counsel for Appella

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WM. R. STANSBURY
CLERK

No. 415.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

TERRENCE DRUGGAN, Appellant,

v.

PALMER E. ANDERSON, UNITED STATES MARSHAL, ETC., AND WESLEY WESTBROOK, SUPERINTENDENT OF THE COOK COUNTY JAIL OF COOK COUNTY, ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Reply Brief and Argument for the Appellant.

THOMAS D. NASH,
MICHAEL J. AHERN,
Counsel for Appellant.

BARNARD & MILLER PRINT, CHICAGO

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REPLY BRIEF AND ARGUMENT FOR THE APPELLANT.

I.

TITLE II OF THE NATIONAL PROHIBITION ACT IS UNCONSTITUTIONAL.

Appellant in his original brief based his contention that Title II of the National Prohibition Act is unconstitutional upon the following proposition:

Major premise: The Eighteenth Amendment went into effect January 16, 1920.

Minor premise: No law grants authority, confer power, or imposes a duty or obligation until it goes int effect.

Conclusion: Therefore Congress, which passed Tit II of the National Prohibition Act on October 28, 191 had no power or authority to legislate with respect t prohibition until the Eighteenth Amendment went int effect on January 16, 1920.

Appellees, in their argument (p. 5), attack only th major premise, and thereby concede the minor premis the truth of which has been amply demonstrated by ap pellant under Point I-A of his argument (p. 9), and th authorities there cited and quoted from (pp. 13 to 21 They thereby concede, also, that this court has not here tofore passed upon the validity of Title II on the poi here urged. (See Appellant's Argument, p. 22.)

If, therefore, the major premise of the above propos tion be true, which alone is disputed by appellees, must follow necessarily that the conclusion of that pro osition is true, and, if so, that Title II of the Nation Prohibition Act is unconstitutional. Appellees hav therefore, narrowed the issue on this point to appe lant's major premise.

Appellees contend that appellant's major premise i based on a misconception of the language used by th court in *Dillon* v. *Glos*, 256 U. S. 368 (Appellee's Argu ment, p. 5.) In endeavoring to explain the nature this alleged misconception, they say (p. 6),

> "It is plain that this court in using * * * the language, 'was to go into effect one year aft being ratified,' referred to the time the prohibitio contemplated by the amendment should become e fective, that is, when intoxicating beverages shou be outlawed."

Appellees, by this statement, would have us believe, th

this court meant something other than what it said, when it used plain, unequivocal terms, viz.:

> "* * *, the latter (the Eighteenth Amendment) by its own terms was to go into effect one year after being ratified."

This court drew no such subtle and refined distinction, between the prohibition contemplated by the Amendment and the Amendment itself, as appellees so naively attribute to the court. Appellant in his brief anticipated this argument of appellees and there showed (p. 31), that the prohibition contemplated by the Amendment is not one thing, and the Amendment itself another thing, but that the prohibition *is* the Amendment, and the Amendment *is* the prohibition, and further showed (p. 32), that the Amendment did not merely fix a time in the future for the inhibition of intoxicating liquors, and that it was not the supreme law of the land until January 16, 1920. To illustrate further, the argument there advanced (p. (32) let us suppose that in the month of February, 1919, subsequent to the ratification of the Eighteenth Amendment, January 16, 1919, but before its effective date, January 16, 1920, and also prior to the passage of Title II of the Prohibition Act, October 29, 1919, a citizen had sold intoxicating liquor for beverage purposes. Concededly, if the Eighteenth Amendment went into effect when ratified, he would be guilty of a violation of the Constitution even though, of course, subject to no penalty. One may transgress a provision of the Constitution without being guilty of a specific crime and without incurring a penalty, where the transgression has not been defined by Congress to be a crime. But will anyone say that the citizen who thus sold liquor in the month of February, 1919, violated the Eighteenth Amendment by so doing? If he did not, then the Eighteenth Amendment was not at that time the supreme

law of the land. If it was not supreme law for that purpose, it was not supreme law for any purpose, and hence Congress could receive no power under it, until it became supreme law.

While appellees make the naked statement, that the language of *Dillon* v. *Glos,* referred to the time when prohibition should become effective, and not to the Amendment itself, they have failed wholly to point out to the court wherein the argument of the appellant (pp. 31 to 33) on that point, is unsound or unreasonable.

We do not see how the language of Section 1 of the Eighteenth Amendment is susceptible of any other construction than that placed upon it by this court in *Dillon* v. *Glos.* That section does not say that the manufacture, sale or transportation of intoxicating liquors is *now* prohibited, or is prohibited *upon* ratification, but says that *after one year* it is prohibited. In other words, one year must elapse after ratification before it is prohibited. If appellant has misconceived the language of this court in *Dillon* v. *Glos,* so also then has the Supreme Court of Florida misconceived it. See excerpt from *Neisel* v. *Moran,* 80 Fla. 98, quoted in appellant's argument (p. 17).

Appellees next urge Article V of the Constitution as an answer to appellant's contention, and say (p. 6), that by virtue of this article, the Eighteenth Amendment upon ratification January 16, 1919, "then became 'valid to all intents and purposes,' as part of the Constitution." Appellant in his argument anticipated this objection and there fully answered it. (pp. 24 to 30.) Appellees have not seen fit to answer appellant's argument on this objection, possibly, because they cannot escape the conviction, that they are unable to do so successfully, but have contented themselves with the bar

assertion, that by virtue of Article V, the Eighteenth Amendment became effective immediately upon ratification. They then say, "and Congress and the several States thereupon had concurrent power under Section 2 of the Amendment to provide for its enforcement."

No one disputes the fact that the several States had power on January 16, 1919, to enact prohibition statutes. That power, however, was not then derived from the Eighteenth Amendment, but theretofore and then existed, because of an inherent plenary power residing in the several states, to pass any law, not forbidden by the Constitution of the United States, or by the Constitution of the particular state which sought to exercise the power. Likewise, if the Eighteenth Amendment became effective immediately upon ratification, then no one disputes, but that Congress, as appellees say, "thereupon had * * * power under Section 2 of the Amendment to provide for its enforcement." But, if the Eighteenth Amendment did not become effective immediately upon ratification, as appellant contends, then Congress did not, at the time of ratification, receive power under Section 2 to provide for its enforcement, as demonstrated by appellant in his argument. (p. 34.)

In concluding their argument on this point, appellees say, "The bill (referring to Title II of the National Prohibition Act) was passed over the veto of the President on October 28th, 1919, and thereupon became law, though its provisions did not 'go into effect' until January 16th, 1920." The statement that the bill "thereupon became law" begs the entire question here presented. The further statement, "though its provisions did not 'go into effect' until January 16th, 1920," is tantamount to an admission that the Eighteenth Amendment itself did not go into effect until January 16, 1920, because such statement is based on the language of Sec-

tion 3 of Title II and Section 21 of Title III of the National Prohibition Act, both of which clearly express the construction and interpretation placed by Congress, upon the Eighteenth Amendment (which had then been ratified) with reference to the date when it should become effective. These sections are:

Section 3, Title II.

> "No person *shall* on or after *the date* when the Eighteenth Amendment to the Constitution of the United States *goes into effect,* manufacture, sell * * * intoxicating liquor, etc., etc."

Sec. 21, Title III.

> "Titles I and III and Sections 1, 27, 37 and 38 of Title II of this Act shall take effect and be in force from and after the passage and approval of the act. The other sections of Title II shall take effect and be in force *from and after the date when* the Eighteenth Amendment to the Constitution of the United States *goes into effect.*"

By the provisions of Section 21, Titles I and III and Sections 1, 27, 37 and 38, of Title II, became effective immediately upon the passage of the act. The authority of Congress, to make these titles and sections effective immediately, was derived from its war powers. Congress recognized that it received no power from the Eighteenth Amendment to make the other sections of Title II effective immediately, because that Amendment had not yet gone into effect. It failed to observe, however, that until the Amendment actually went into effect, it had no power at all to enact the other sections of Title II; that, since it could not make them effective immediately, it could not make them effective at all, until power was vested in it by the Constitution. Congress may legislate, only where authority to do so has been granted by the Constitution. In whatever instances under the Constitution it has the right to legislate, it has

ipso facto the right to make its legislation effective immediately.

If it has not the right to make its legislation effective immediately, then, *ipso facto*, it has not the right to legislate; and if it has not the right to legislate, then it has not received authority to do so from the Constitution.

II.

SECTION 24 OF TITLE II IS AN INVASION OF THE JUDICIAL POWER.

Counsel have failed to cite a single case wherein a statute, containing a minimum penalty for contempt, has ever been sustained against the objection raised by the appellant in this cause. True, there are liquor statutes in several of the states (as shown by the compilation in appellees brief) containing such provisions. But there is no reported case, that we know of, passing upon the precise point raised in the instant case. If properly tested, the statutes in appellees' compilation might be found to be subject to the same infirmity, as is here urged against Section 24.

We submit that the decisions cited in the opposing brief, strengthen and confirm the correctness of our contention, that the minimum limitation of punishment, as defined in Section 24 of Title II, is an invasion of the inherent powers of courts of equity to punish for contempts of their authority.

Let us, therefore, proceed to an exposition of the rulings in the three decisions cited under this division of appellees' argument.

True, *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, involves an Iowa liquor statute containing a minimum and maximum penalty provision. Neither the opinion in

the *Eilenbecker* case, nor the excerpts from the briefs of counsel included by the official reporter of this court, show that any point was presented on the validity of the statute there involved, because of the definite maximum and minimum penalty, imposed upon contemnors thereunder. In that case this court held substantially at page 36 (134 U. S. 31), that the Iowa statute was a reaffirmation of the inherent power of State courts to punish for contempts according to the course of the common law. The District Courts of the United States, however, do not possess this inherent power according to the common law. They are created by Congress, and owe their inherent power to the act of their creation, as that power has been limited and defined by the Act of 1831, now Sec. 268 of the Judicial Code. *Ex parte Robinson,* 19 Wall. 505. 510. Under this act they have power to punish for contempt by fine *or* imprisonment, not both. Also under this act, they are not limited in the extent of the fine or imprisonment to be imposed.

Sec. 24 of Title II, however, seeks to invade the inherent power defined by Sec. 268 of the Judicial Code by changing this power, to the extent of allowing punishment by both fine and imprisonment, and by limiting that power in the infliction of such punishment to a maximum and minimum.

Mugler v. *Kansas,* 123 U. S. 623, did not fix a minimum and maximum penalty for contempt, or for the violation of an injunction, as stated by appellees at page 10 of their argument. The statute there involved merely provided for the abatement in equity of a nuisance, and fixed a penalty upon conviction of one found guilty of maintaining such nuisance. Neither the Kansas statute (Compiled Laws of Kansas (Dassler), 1881, Paragraph 2150, 2162) nor the decision in the *Mugler* case had anything to do with contempt, or the inherent power of courts to punish therefor.

In *Michaelson* v. *United States,* 266 U. S. 42, this court sustained the constitutionality of the provision of the Clayton Act (Sections 21 and 22), granting a jury trial in contempt proceedings thereunder for "wilful disobedience of any writ, * * * if such act or thing be of such character, as to constitute also a criminal offense under any statute of the United States, or law of any state in which the act is committed." Mr. Justice Sutherland there observes:

> "The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not in our opinion, invade the powers of the courts as intended by the Constitution, or violate that instrument in any other way."

How appellees find comfort in the *Michaelson* case we fail to understand. Nothing in the Clayton Act establishes or defines a minimum penalty for contempt. The only limitation is a maximum of six months imprisonment and/or a $1,000 fine. At page 41 of our opening brief we specifically stated:

> "Many of the states have set a maximum penalty for the punishment of contempts, and these have usually been held to be valid, on the ground that the Legislature has thereby made effective the Constitutional inhibition against the imposition of excessive fines, and the infliction of cruel and unusual punishments."

The jury provided for by Sections 21 and 22 of the Clayton Act finds neither the extent of the sentence nor the amount of the fine. All that the jury passes upon is the fact question of the contemnor's guilt or innocence. It remains with the chancellor to impose punishment, without a minimum limitation, as he, in his sole discretion, sees fit up to a fine of $1,000 and/or a sentence of imprisonment for six months. Thus Section 22 of the Clayton Act is a measure designed for the protection of a respondent to a contempt charge.

Appellees have wholly failed to reply to the distinction for which we contend: That Congress may restrict or limit the class of cases wherein the contempt power may be exerted, but that Congress may not in the class of cases where the contempt power may be exerted, interfere with the plenary power of courts of equity to assess punishment upon contemnors, by superseding the discretion of a chancellor with a statutory minimum of punishment without regard to the degree of the contemnor's fault.

That appellant received the maximum sentence and fine under Section 24, is no argument in favor of its validity. As the maximum penalty is provided for, in a statute which is void, because of its inclusion of a minimum penalty, the greater must fall with the lesser.

III.

SECTION 24 OF TITLE II OF THE NATIONAL PROHIBITION ACT VIOLATES THE SIXTH AMENDMENT TO THE CONSTITUTION.

A federal court of equity has power, independently of statute, to punish a contemptuous violation of an injunctional order. But when it so undertakes to act, it is governed by Section 268 of the Judicial Code:

> "* * * to punish, by *fine or imprisonment*, at the discretion of the court, contempts of their authority."

So that under the Code a court may not punish by *both* fine *and* imprisonment.

In the instant case there are both maximum fine and maximum imprisonment. Hence it follows, that sentence and fine must be held to be founded upon Section 24 of Title II of the Prohibition Act; for, without that statute, there could be no legal foundation for both fine *and* imprisonment.

We readily admit that a jury is not necessary where the court acts, independently of statute, by virtue of its inherent plenary capacity to punish a contemnor. But we do contend that where the alleged contempt is the violation of a statute, creating an offense punishable by *both fine and imprisonment,* with minimum and maximum limits, that the mere designation "contempt of court" does not change the nature of the offense, which, through all variant nomenclature, remains but a statutory crime.

The Act of 1831, specifying the instances where the contempt power may be exerted, limited the exertion of that power to a class of cases, as to which, the District Courts were given power to vindicate their authority by fine or imprisonment, not by both.

Mugler v. *Kansas,* 123 U. S. 623, 672, did not involve a contempt statute, and the excerpt from Mr. Justice Harlan's opinion (appellees' argument, p. 17) did not refer to such a statute; that case merely decided that jury trials were not required in equity proceedings to abate a nuisance, which we concede to be good law.

Eilenbecker v. *Plymouth County,* 134 U. S. 31, 39, we have already shown is not applicable to federal power; that it merely recognizes the Iowa statute, as being confirmatory of the inherent power of the State courts to punish for contempts, according to the course of the common law; that the attempted power sought to be granted by Sec. 24 of Title II is an invasion of the inherent power of the Federal District Courts, as such power has been limited and defined by Sec. 268 of the Judicial Code, or else, that Sec. 24 defines a crime by fixing a minimum and maximum penalty, or at least an offense, in the nature of contempt, unknown to the common law and to the framers of the Constitution, and, therefore, within the purview of the Sixth Amendment.

The other cases, cited by appellees on page 12 of their brief, do not sustain their contention.

In *Myers* v. *United States,* 264 U. S. 95, the injunction restrained strikers from interfering with men at work. An equity court may always do that upon a proper showing. Though the Clayton Act was involved, the provision of that act, under which injunctive relief was had, is but declaratory of the principles of equity jurisprudence. No objection was made to the provisions of Section 22 of the Clayton Act, authorizing a maximum punishment by both fine and imprisonment, and this court did not pass upon that point.

All that the court decided in the *Myers* case, *supra,* was, that Section 53 of the Judicial Code did not apply to either civil or criminal cases, and that contempt, for violation of an order of court, may be punished in the division of a district in which the order was entered, although disobedience occurred in another division.

In the nature of things, contempt being an offense against the authority of a court, the venue of the offense is the court whose dignity was assailed. The contemnor is constructively present in court when he violates its orders.

In *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, this court sustained the constitutionality of the 12th section of the Interstate Commerce Act, relating to the authority of the Circuit Courts, to use their process in aid of inquiries before the Commission. What is there said, about jury trials not being required in contempt cases, does not refer to statutory contempts but to the inherent plenary power of a court to vindicate its own authority.

In *Ex parte Terry,* 128 U. S. 289, the contemnor was imprisoned but not fined. And that well-known case is

a clear example of the exercise of the inherent plenary power of any court of record to punish a breach of the peace in open court.

In re Debs, 158 U. S. 564, and *Gompers* v. *Bucks Stove Company*, 221 U. S. 418, were not dependent upon a statute, and the punishment assesed in each of those cases was imprisonment without a fine.

The fact that certain of the lower federal courts have ruled to the contrary on this provision, and that the question has been raised in so many different ways, should, we respectfully submit, commend itself to your Honors, as calling for an expression of opinion that will set at rest all doubts in the construction of this statute.

The Solicitor General says, at page 14 of appellees' brief:

> "Cases, in which this question has been decided adversely to the claim now made, have been presented to this court, upon petitions for writs of certiorari and uniformly the petitions have been denied."

But the denial of a petition for a writ of certiorari is not equivalent to an affirmance. As well said by Mr. Justice Pitney in *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 258:

> "It is, of course, sufficiently evident, that the refusal of an application for this extraordinary writ (certiorari) is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Appellees have made no answer to the argument of appellant, under Point III of his argument (p. 42), to the effect that the offense defined by Sec. 24 is something other and different from "contempt," properly so called, as they were known to the common law, and contemplated by the framers of the Constitution. Appellees have not disputed that Sec. 24 changes what was there-

tofore a civil offense, into a criminal one, and that the offense defined by Sec. 24 does not come within the purview of the power, known as the inherent plenary power of the courts.

IV.

THE INJUNCTIONAL ORDER UPON WHICH THE JUDGMENT IS FOUNDED IS ABSOLUTELY VOID AS DISTRICT COURTS ARE WITHOUT POWER AND ARE EXPRESSLY PROHIBITED BY EQUITY RULE 73 FROM GRANTING TEMPORARY INJUNCTIONS WITHOUT NOTICE.

Appellees, by way of reply to our argument on this point, present *McFarland* v. *United States*, 295 Fed. 648, wherein the Circuit Court of Appeals for the Seventh Circuit, follows one of its earlier decisions (*Lewinsohn* v. *U. S.*, 278 Fed. 421), and decides against our contention. But your Honors will note that that court specifically states (649):

> "That there is a repugnancy between Section 22 of this latter act and equity rule No. 73 and Section 17 of the Clayton Act *must be conceded.*"

Notwithstanding the expressed intent of Congress found in the language of Section 22, Title II of the Prohibition Act, that "*Such action shall be brought and tried as an action in equity* and may be brought in any court having jurisdiction to hear and determine equity cases," the Court of Appeals in the *McFarland* case, presents the following novel thought, as to what Congress had in mind by enacting the above quoted provision (649):

> "It is also apparent, we think, that it was the obvious and the expressed intention of Congress, in enacting the National Prohibition Act, to make an exception to the general rule, and prescribe a specific code of practice or procedure which govern equity suits authorized by the act to be brought to abate nuisances."

The Equity rules have the force of statutes. If it were the intention of Congress, that Equity proceedings under the Prohibition Act should not be subject to the Equity Rules, it would have been an easy mater to have so said.

CONCLUSION.

As stated by Mr. Justice Holmes, in *Chin Yow* v. *United States*, 208 U. S. 8, 13:

> "Habeas Corpus is the usual remedy for unlawful imprisonment."

Here we are assailing a judgment based upon a statute, which we contend is unconstitutional. So, too, we contend that the court which entered the judgment had no jurisdiction of the subject matter.

Says Mr. Justice Bradley, in *Ex parte Siebold*, 100 U. S. 399:

> "The only ground on which this court, or any court, without some special statute, authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. * * * The validity of the judgment is assailed, on the ground that the Acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law, that the judgment of an inferior court affecting it is not deemed so conclusive, but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or

judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon those laws."

The authority of the District Court to proceed with the injunction in the instant case was dependent upon Equity Rule 73 requiring notice of the entry of a temporary injunction. And the injunctional order together with the judgment convicting appellant of contempt, is based upon Title II of the National Prohibition Act, and also upon Section 24 thereof, both of which are unconstitutional and void.

Again we respectfully pray, that this Honorable Court reverse the decision of the District Court for the Northern District of Illinois, Eastern Division, with directions to that court to reinstate the petition, and to overrule the demurrer.

Respectfully submitted,

THOMAS D. NASH,
MICHAEL J. AHERN,
Counsel for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 415

TERRENCE DRUGGAN, APPELLANT

v.

PALMER E. ANDERSON, UNITED STATES MARSHAL, etc., and Wesley Westbrook, Superintendent of the Cook County Jail of Cook County, Illinois

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEES

This is an appeal from the order of the United States District Court for the Northern District of Illinois dismissing the petition for a writ of *habeas corpus* (p. 26). The case is not officially reported below and there is no opinion printed in the record.

JURISDICTION

Apparently the jurisdiction of this Court is invoked under Section 238 of the Judicial Code upon the constitutional ground. The order ap-

pealed from is dated April 22, 1925 (p. 26), and the appeal was allowed the same day.

THE QUESTIONS INVOLVED

The petition for *habeas corpus* was based upon the claim that Title II of the National Prohibition Act of October 28, 1919, c. 85, 41 Stats. 305, 307, with the exception of Sections 1, 27, 37, and 38, is unconstitutional (pp. 2 and 3) and that the injunctional order for the violation of which appellant was in custody was void for the further reason that it was issued without notice contrary to Equity Rule 73 (p. 4). The court overruled these contentions and dismissed the petition. This appeal followed.

On June 1st, 1925, this Court denied an application for bail pending appeal, and set the case for argument on October 5th.

STATEMENT OF THE CASE

From the petition it appears that on February 6, 1924, a bill was filed by the United States against the petitioner and other persons in a proceeding under Section 22 of Title II of the National Prohibition Act to enjoin a nuisance; that a temporary injunction was obtained by the Government on February 7, 1924, without notice to the petitioner; that on June 9, 1924, the Government filed an information pursuant to Section 24, Title II of the same Act, to show cause why

petitioner and the others should not be punished for contempt of court for violating the injunction; that thereafter petitioner was convicted of violating the order and was sentenced to imprisonment in the Cook County jail for one year and fined $1,000 (p. 1); that petitioner sued out a writ of error from the Circuit Court of Appeals for the Seventh Circuit to review said judgment; that said Circuit Court of Appeals affirmed the judgment; and that his commitment followed (p. 1).

From the exhibits attached to the petition it appears that the bill of complaint containing the prayer for a temporary injunction, together with a supporting affidavit, was filed February 6, 1924 (p. 12), and a further supporting affidavit was filed on February 7, 1924 (p. 14). That the answer of the defendants, including Druggan, was filed March 31, 1924 (p. 20). In this answer the defendants admit "that said suit is of a civil nature arising under the Constitution and laws of the United States, and that jurisdiction thereof is given to this Honorable Court by Section 22 of Title II of said Act of Congress and by Section 26 of the Judicial Code of the United States" (p. 17).

In the information for contempt it is alleged that the temporary injunction was served on Druggan on or about the 24th day of March, 1924 (p. 21), and that the acts in violation of the injunction were committed on the 31st day of

May, 1924, the 2nd and 3rd days of June, 1924 (pp. 22, 23). The charge was that Druggan and the others had removed from the premises 800 barrels of beer and caused them to be placed on railroad cars. The answer to the information for contempt was merely a general denial (p. 24).

The offense was, therefore, willful and deliberate; after due notice of the bill and the injunction, and after formal admission of the jurisdiction of the Court.

He began to serve his sentence on November 11th, 1924 (p. 6). Therefore, with good conduct allowances, he might have been free ere this. (Act of June 21, 1902, ch. 1140, 32 Stat. 397.)

ASSIGNMENTS OF ERROR

The assignments of error (pp. 27–31) are eleven in number with many subdivisions, but in the brief filed in this court only four points are urged:

(1) That Title II of the National Prohibition Act was enacted before the Eighteenth Amendment went into effect as a part of the Constitution and is therefore unconstitutional.

(2) Section 24 of Title II is an invasion of the judicial power and therefore unconstitutional.

(3) Section 24 of Title II violates the Sixth Amendment of the Constitution.

(4) The injunctional order upon which the judgment is founded is void for want of jurisdiction to enter it.

These points will be considered in their order.

ARGUMENT

I

Title II of the National Prohibition Act was not enacted before the Eighteenth Amendment became a part of the Constitution

The fundamental error of the appellant's position is the claim that the National Prohibition Act was passed before the Eighteenth Amendment "went into effect," and is based upon a misconception of certain language used by this Court in *Dillon* v. *Gloss*, 256 U. S. 368. The complete paragraph of that opinion, from which appellant quotes an excerpt in his brief, is as follows (256 U. S. 376):

> The provisions of the act which the petitioner was charged with violating and under which he was arrested (Title II, §§ 3, 26) were by the terms of the act (Title III, § 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919. That the Secretary of State did not proclaim its ratification until January 29, 1919, is not material for the date of its consummation, and not that on which it is proclaimed, controls. It follows that the provisions of the act with which the petitioner is concerned went into effect January 16, 1920. His alleged offense

> and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded.

It is plain that this court in using, with respect to the Eighteenth Amendment, the language, " was to go into effect one year after being ratified," referred to the time when the prohibition contemplated by the Amendment should become effective, that is, when intoxicating beverages should be outlawed. By Article 5 of the Constitution, amendments—

> shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof,

The language of Section 1 of the Amendment is:

> After one year from the ratification of this article the manufacture * * * of intoxicating liquors * * * is hereby prohibited.

The ratification of the Eighteenth Amendment, of which fact this Court took judicial notice, was consummated January 16, 1919. Therefore, by express provision of the Constitution, it then became " valid to all intents and purposes " as part of the Constitution, and Congress and the several States thereupon had concurrent power under Section 2 of the Amendment to provide for its enforcement. The Bill was passed over the veto of

the President on October 28, 1919, 41 Stats. 323, and thereupon became law, though its provisions did not " go into effect " until January 16, 1920.

Nothing more need be said on this point.

II

Section 24 of Title II is not unconstitutional as being an invasion of the judicial power

Section 24 provides (41 Stat. 315):

> Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days or more than twelve months, or by both fine and imprisonment.

The appellant's objection to this provision is that it fixes a minimum as well as a maximum penalty, and thereby encroaches upon the judicial power. This claim seems to us to be wholly without merit. In the case of *Michaelson* v. *The United States,* 266 U. S. 42, this court had under consideration the constitutionality of sections 21 and 22 of the Clayton Act of October 15, 1914, c. 323, 38 Stats. 738, which provided for trial by jury of certain contempts of court. Delivering the opinion of the court holding the statute constitutional, Mr. Justice Sutherland, at pages 65–66, said:

> But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is in-

herent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson,* 19 Wall. 505, 510–511; *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 326); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within the limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is, to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are ex-

cluded a different and more serious question would arise.

Section 22 of the Clayton Act limited the fine to be imposed and paid to the United States to the sum of $1,000 and limited imprisonment to the term of six months. Certainly, if it is within the power of Congress to requre a trial by jury and to limit the sentence to be imposed by the court upon conviction, it is within the power of Congress to fix a minimum penalty. It does not tend to render "practically inoperative" or "abrogate" the inherent power of the court. On the contrary, it tends to dignify the courts and uphold their hands in the performance of their duty by making wilful disobedience to their commands a serious offense.

We do not see how the appellant is in a position to advance this argument. The record does not indicate that the trial judge was embarrassed by reason of his inability to impose upon Druggan a small fine. He gave him the maximum penalty of the law.

At the time of the adoption of the Eighteenth Amendment state statutes containing similar provisions had been in force for many years; had been uniformly upheld and their provisions containing minimum penalties for contempt of court had never, so far as we can ascertain, been seriously questioned. The statute of Iowa considered by this Court in *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, provided for the abatement of liquor

nuisances by injunction and for punishment for contempt thereof by a fine of not less than $500 nor more than $1,000, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. The statute is set forth in a footnote in 134 U. S. 35.

The statute of Kansas considered by this Court in *Mugler* v. *Kansas,* 123 U. S. 623, set forth at length in the opinion of this Court in 123 U. S. 670, provided a penalty for violating an injunction of not less than $100 nor more than $500, or by imprisonment for not less than thirty days nor more than six months, or by both such fine and imprisonment. The following statutes contain minimum penalties to be imposed upon conviction for contempt of court in liquor cases and, so far as we are advised, have never been held to be invasions of the judicial power.

Arkansas: Sec. 7, Act 109, Acts of Ark., 1915, pp. 408, 413. Minimum penalty, 30 days.

Colorado: Sec. 3706, Comp. Laws 1921. Minimum penalty not less than $100 or 30 days' imprisonment.

District of Columbia: Sec. 14, Act Mar. 3, 1917, 39 Stat. 1123. Minimum penalty, $100 or 30 days' imprisonment.

Indiana: Sec. 8356w, Ind. Ann. Stat. (Burns), Vol. 6, p. 1400. Minimum penalty, $100 and 30 days' imprisonment.

Iowa: Sec. 2029, Code 1924, p. 302. Minimum penalty, first offense, $200 or 3 months' imprisonment, or both. Minimum penalty, second offense, $500 or one year hard labor.

Kansas: Ch. 21, Sec. 2131, Rev. Stat. Kans. 1923, p. 406. Minimum penalty, $100 and 30 days.

Montana: Sec. 11128, c. 30, Rev. Code 1921, Vol. 4, p. 131. Minimum penalty, $100 or 30 days.

Nebraska: Sec. 3264, ch. 33, Comp. Stat. 1922, p. 1093. Minimum penalty, $200 or 3 months.

North Dakota: Sec. 10118, Comp. Laws 1913, p. 2327. Minimum penalty, first offense, $200 and 90 days. Second offense, minimum penalty, one year.

Oregon: Sec. 2224–35, Ore. Laws (Olson) 1920, Vol. 1, p. 1285. Minimum penalty, $100 or 30 days.

South Dakota: Sec. 10296, Rev. Code 1919, Vol. 2, p. 2682–3. Minimum penalty, $200 and 30 days, first offense. Second offense, minimum penalty six months.

Tennessee: Sec. 5164a12, Ann. Code 1918, Vol. 5, p. 5270. Minimum penalty, 30 days.

Virginia: Sec. 4675 (90), Code 1924, p. 1131. Minimum penalty, $100 and one month imprisonment.

West Virginia: Sec. 1293, Code of West Va. Suppl. 1918, p. 252. Minimum penalty, $100 and 30 days' imprisonment.

III

Section 24 of Title II of the National Prohibition Act does not violate the Sixth Amendment to the Constitution

The appellant claims that Section 24 of the Act violates the Sixth Amendment providing for jury trials in criminal prosecutions and says: "If the section is to stand at all, it must stand as a definition of a newly created crime to be tried without a jury." (Brief, p. 42.) Criminal contempts, however, have been recognized as triable by the court without a jury for too many years to be called "newly created crimes." That courts have inherent power to punish as for contempt violations of their orders is too well settled to be open to further argument.

Myers v. *United States,* 264 U. S. 95.
Gompers v. *Bucks Stove & Range Co.,* 221 U. S. 418.
Eilenbecker v. *Plymouth County,* 134 U. S. 31.
Mugler v. *Kansas,* 123 U. S. 623.
In re Debs, 158 U. S. 564.
Interstate Commerce Commission v. *Brimson,* 154 U. S. 447.
Ex parte Terry, 128 U. S. 289.
Cartwright's Case, 114 Mass. 230.

The moment the courts of the United States were called into existence and vested with jurisdiction over any subject, they became possessed of this power. *Ex parte Robinson,* 19 Wall. 505.

In the case of *Myers* v. *The United States,* 264 U. S. 95, a case arising under the contempt provisions of Section 21 of the Clayton Act of October 15, 1914, c. 323, 38 Stats. 730, an attempt was made to distinguish between so-called statutory contempts and contempts under the doctrine of the inherent power of the courts. It was urged that ordinary contempts punishable by courts of equity without trial by jury differed radically from the so-called statutory contempt under the Clayton Act, and it was urged that Sections 51, 52, and 53 of the Judicial Code controlled the venue when such statutory contempts were alleged; specifically, that the plaintiffs in error should have been tried in the district where their offenses had been committed. Mr. Justice McReynolds, delivering the opinion of the court, said, page 103:

> None of the cited Code sections makes specific reference to contempt proceedings. These are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions.

This specific point arising under Section 24 of the National Prohibition Act has been considered and the validity of the section upheld in *United States* v. *Cohen,* 268 Fed. 420; *Lewinsohn* v. *United*

States, 278 Fed. 421 (C. C. A. 7th Cir.); *Wedel* v. *United States,* 2 Fed. (2d) 463 (C. C. A. 9th Cir., November, 1924); *Denapolis* v. *United States,* 3 Fed. (2d) 722 (C. C. A. 5th Cir., January, 1925).

Cases in which this question has been decided adversely to the claim now made have been presented to this Court upon petitions for writs of certiorari and uniformly the petitions have been denied. See *Lewinsohn* v. *United States,* 258 U. S. 630; *Heintz* v. *United States,* 263 U. S. 715; *Douglas* v. *United States,* 264 U. S. 590; *Keystone Brewing Co.* v. *United States,* denied April 20, 1925.

In *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, Mr. Justice Miller, speaking for the Court, discussed at length the question of the right of courts to punish for contempt without a jury trial. This was a case that rose in the State of Iowa under a statutory provision much like the section of the Prohibition Act which we are here considering. The contention there made was that the Iowa statute was repugnant to the Fourteenth Amendment. He said (p. 39):

> So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and

decrees, and can not be said to deprive the parties of their liberty or property without due process of law.

He then proceeded to say:

> The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.
>
> We can not accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.

The case of *Mugler* v. *Kansas*, 123 U. S. 623, arose under the prohibition laws of the State of Kansas, which contained provisions for the abatement of liquor nuisances by injunction and the punishment of violators of injunctions as for contempt. In upholding those laws, Mr. Justice Harlan, speaking for the Court, rendered an exhaustive opinion, and said, among other things (pp. 672–3):

> Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. "In regard to public nuisances," Mr. Justice Story says, "the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction." 2 Story's Eq. Sections 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in

> progress, and, by perpetual injunction, protect the public against them in the future, whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. * * *
>
> As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. * * *

The effect of the Eighteenth Amendment was to give to Congress the same police powers to stamp out the manufacture, sale, and transportation of liquor that the States had before the Amendment. *United States* v. *Cohen,* 268 Fed. 420, 425.

It can not be said that statutory remedies, theretofore used and found to be effective by the States for a long period of years, which had been bitterly assailed upon almost every conceivable ground and uniformly sustained, are unconstitutional when adopted by Congress as "appropriate legislation."

IV

The injunction order upon which the contempt proceedings were based was not void because issued without notice

The appellant relies upon Rule 73 of the Equity Rules and claims that its effect is to prohibit the

exercise of the injunctive power without complying with its terms. He says (Brief p. 50):

> Unless notice of the application for an injunction be given to the defendants, the District Court is shorn of power to act. Thus the rule goes to the jurisdiction of the court to enter an injunctural order.

Section 22 of the National Prohibition Act, so far as material is as follows (41 Stat. 314):

> SEC. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the

> violation of this Act constituting such nuisance. * * *

It appears, therefore, that the Court is empowered to issue a temporary injunction "forthwith." This language can mean nothing less than what it says. "Forthwith" does not mean after notice, and if inconsistent with Rule 73 must be considered to have superseded it. The contention now made has been passed upon twice by the Circuit Court of Appeals for the Seventh Circuit. *Lewinsohn* v. *United States,* 278 Fed. 421; *McFarland* v. *United States,* 295 Fed. 648. In the *McFarland case* the Court said (p. 649):

> (1) The temporary "writ of injunction," as it is termed, was issued without notice, and is attacked as absolutely void (because of equity rule No. 73 and section 17 of the Clayton Act [Comp. St. Sec. 1243a].) Its violation, so it is contended, affords no basis for criminal contempt proceedings.
>
> This same question was presented to us, and decided adversely to plaintiffs in error in *Lewinsohn* v. *United States,* (C. C. A.) 278 Fed. 421. Counsel for plaintiffs in error, while recognizing the effect of this holding, earnestly urge us to reconsider the views there expressed, and to reconcile section 22 of the National Prohibition Act with the practices prescribed by equity rule No. 73 and the section of the Clayton Act referred to. We have given further study to the question, with the result that our conclu-

sion respecting the intent and purpose of Congress in enacting section 22 of the National Prohibition Act has been confirmed.

That there is a repugnancy between section 22 of this latter act and equity rule No. 73 and section 17 of the Clayton Act must be conceded. It is also apparent, we think, that it was the obvious and the expressed intention of Congress, in enacting the National Prohibition Act, to make an exception to the general rule and prescribe a specific code of practice or procedure which governs equity suits authorized by the act to be brought to abate nuisances. When Congress provided, "If it is made to appear by affidavits or otherwise to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial," it left no room for doubt respecting its intention to authorize the issuance of injunctions without notice which were to continue until "the conclusion of the trial." In the present suit it appeared that defendant answered the bill of complaint, never sought to modify or vacate the "writ of injunction," and while the suit was thus pending and before its trial committed the alleged contempt.

Aside from this, however, it would seem that, at most, the failure to give notice was a mere irregularity. Aside from the provisions of the National

Prohibition Act, the District Court had a general jurisdiction to entertain a suit by the United States to abate a nuisance, to issue an injunction in connection with that suit, and to punish any one who violated it, and according to well-settled principles no one may with impunity violate an injunction under such circumstances. He must either obey it or apply in an orderly way to have it vacated or modified. In the case of *Howat* v. *United States,* 258 U. S. 181, this Court, speaking by Mr. Chief Justice Taft, said (pp. 189–190):

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 450; *Toy Toy* v. *Hopkins,* 212 U. S. 542, 548. See also *United States* v. *Shipp,* 203 U. S. 563, 573.

CONCLUSION

We have treated the points raised by the appellant at some length. Nevertheless we feel that they are wholly without merit and present no such substantial constitutional question as justifies invoking the jurisdiction of this Court by direct appeal, and for that reason this Court may well dismiss the appeal as for want of jurisdiction upon the authority of *Wise* v. *Mills,* 220 U. S. 549; *Wise* v. *Henkel,* 220 U. S. 556; *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195; *Sugarman* v. *United States,* 249 U. S. 182.

That a writ of *habeas corpus* may not be used *in place of* a writ of error has been said many times. See *Collins* v. *Johnson,* 237 U. S. 502; *Craig* v. *Hecht,* 263 U. S. 525.

It would seem to be equally true that its use, *in addition to* a writ of error, should not be sanctioned. No point is here raised which could not have been raised by writ of error to the judgment of conviction. The question of the validity of the statute on which a charge is based is one for the determination of the trial court to be reviewed by writ of error. *Henry* v. *Henkel,* 235 U. S. 219, 229.

When there came to be a right to comprehensive review of criminal cases, the scope of inquiry deemed admissible on *habeas corpus* became relatively narrow. *Salinger* v. *Loisel,* 265 U. S. 224, 231.

After review of the judgment by writ of error, to seek a further review by writ of *habeas corpus,* is an abuse of process which should not be sanctioned. The refusal of the trial court and of this Court to admit the appellant to bail pending appeal has prevented the travesty upon justice which would have resulted had he been at large all these months. It has, however, inflicted unnecessary and unreasonable labor upon the courts and everybody concerned.

For these reasons the appeal should be dismissed for want of jurisdiction, or the judgment should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
OCTOBER, 1925.

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SUPREME COURT OF THE UNITED STATES.

No. 415.—October Term, 1925.

Terrence Druggan, Appellant, *vs.* Palmer E. Anderson, United States Marshal and Wesley Westbrook, Superintendent of the Cook County Jail of Cook County, Illinois.	Appeal from the District Court of the United States for the Northern District of Illinois.

[October 19, 1925.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from an order dismissing a petition for a writ of habeas corpus on demurrer. The petitioner is imprisoned for contempt in disobeying a temporary injunction issued under Section 22 of Title II of the National Prohibition Act; October 28, 1919, c. 85; 41 Stat. 305, 315. The bill upon which the injunction was issued alleged the existence of a public nuisance used for the manufacture, sale, &c., of intoxicating liquor, and charged that the petitioner among others was conducting the business. An injunction was ordered, *pendente lite*. Subsequently an information was filed against the petitioner and others for contempt and the petitioner was sentenced to a fine and to imprisonment for one year. He was committed to jail on November 11, 1924. The main ground for the present petition is that Title II of the Act, with immaterial exceptions, is unconstitutional because it was enacted before Amendment XVIII of the Constitution went into effect. The Amendment prohibits the manufacture, sale, &c., of intoxicating liquors for beverage purposes, 'after one year from the ratification of this article'. The date of the ratification is fixed as January 16, 1919, *Dillon* v. *Gloss*, 256 U. S. 368, 376, and the National Prohibition Act was passed on October 28, 1919 before a year from the ratification had expired. It is said that the prohibition is the Amendment; that until there is a prohibition there is no Amendment, and that without the Amendment the Act of Congress, although it was not

to go into effect until after the Amendment did, Title II, § 3, was unauthorized and void.

We will give a few words to this argument notwithstanding the difficulties in the way of proceeding by habeas corpus in a case like this, *Howat* v. *Kansas*, 258 U. S. 181, 189, 190; *Craig* v. *Hecht*, 263 U. S. 255, and notwithstanding the fact that the validity of the statutes has been supposed to have been established heretofore.— It is not correct to say that the Amendment did not exist until its prohibition went into effect; in other words that there was no Amendment until January 16, 1920, although one had been ratified a year before. The moment that the Amendment was ratified it became effective as a law. The operation of its words a year later depended wholly upon what had happened on or before January 16, 1919. Nothing happened after that date except the lapse of time. This distinction is maintained by the language of the Amendment, which is not that the Amendment shall go into operation a year after it is ratified but that the acts against which it is directed are prohibited after that time, although we attach no other importance to the precise form of words used than that of showing an accurate instinct in those who drew it. Whichever form was used, the world had notice of it, and we apprehend that there would be little difficulty in holding void a contract made in July, 1919, and contemplating performance in disregard of the prohibition in July, 1920. Every dogmatic statement of the law is prophetic of what will happen in a certain event. There is no more reason why the Constitution should not give the warning for the next year than there is for its not giving it for the next moment. We have no doubt of the authority of Congress to pass the law. *Barbour* v. *Georgia*, 249 U. S. 454. *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 615, 616. Indeed it would be going far to say that while the fate of the Amendment was uncertain Congress could not have passed a law in aid of it, conditioned upon the ratification taking place.

A shorter answer to the whole matter is that the grant of power to Congress is a present grant and that no reason has been suggested why the Constitution may not give Congress a present power to enact laws intended to carry out constitutional provisions for the future when the time comes for them to take effect.

It is argued that the preliminary injunction was void for want of the notice required by Equity Rule 73 and the Act of October

15, 1914, c. 323, § 17; 38 Stat. 730, 737. The statute provides that if it is made to appear that the nuisance exists, a temporary injunction shall issue forthwith. § 22. In view of the drastic policy of the Amendment and the statute, we see no reason why the words should not be taken literally, to mean what they say. *McFarland* v. *United States*, 295 Fed. Rep. 648. But if notice were required the injunction could not be disregarded as void. *Howat* v. *Kansas, supra.*

We think the case too clear for extended discussion, but it seemed worth while to say what we have said in explanation of our judgment, although we did not think it necessary to hear the other side.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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